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Supreme Court of the United States

OCTOBER TERM, 1944

No. 788

HARRY BRIDGES,

Petitioner,

against

I. F. WIXON, as District Director, Immigration and Naturalization Service, Department of Justice.

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR HARRY BRIDGES

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INTRODUCTION

This is a petition for a writ of habeas corpus in the District Court for the Northern District of California. Bridges is an alien who entered legally as an immigrant seaman from Australia in 1920, and since then has continuously resided in the United States (R. 791-2).

The Attorney General has ordered Bridges deported on the ground that after entering the United States he "has been" a member and affiliate of the Communist Party of the United States, found to be an organization advocating the violent overthrow of the Government of the United

States and that he "has been" an affiliate of the Marine Workers Industrial Union, found, in turn, to be an affiliate of the Communist Party.[1]

The petition for the writ of habeas corpus charges, in broad, that deportation upon the evidence which survived the hearing and upon the procedures used offends due process, and that the statute, whether viewed on its face or in its application, is unconstitutional. The writ was denied by District Judge Welsh (R. 758-9), whose opinion is reported in 49 F. Supp. 292 (R. 723-59).

THE DECISION BELOW

Appeal taken to the United States Circuit Court of Appeals for the Ninth Circuit led to affirmance of the District Court's order by a 3 to 2 decision (R. 7810). Wilbur, J. wrote for the court in an opinion in which Mathews, and Stephens, JJ. concurred. Judge Stephens delivered a separate concurring opinion in which Wilbur and Mathews, JJ. also concurred. Judge Healy dissented in an opinion in which Judge Garrecht concurred. The opinions are reported in 144 F. (2d) 927 (also R. 7770-7809). A petition for rehearing, addressed principally to the views expressed by the majority as to scope of review was denied in an opinion by Judge Stephens[2] (R. 7811-2).

Proceedings for deportation are stayed by order of the Circuit Court of Appeals for the Ninth Circuit pending the present review (R. 7813).

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[1] There are also charges and findings that the Communist Party circulated printed matter advocating proscribed doctrines (R. 772, 63, 81, 103). In the view we take of the case these charges and findings call for no special treatment.

[2] Thereafter Judge Stephens, without further application by counsel, amended the text of his opinion on denial of rehearing (R. 7815).

JURISDICTION

The jurisdiction of this Court rests on Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C., Sec. 347). This Court has granted its writ of certiorari for review.

STATUTE AND REGULATIONS INVOLVED

Section 2 of the Act of October 16, 1918, as amended June 5, 1920, and June 28, 1940, so far as relevant to this proceeding, provides:

> Any alien who was at the time of entering the United States, or has been at any time thereafter, a member of any one of the classes of aliens enumerated in section 1 of this act, shall upon the warrant of the Attorney General, be taken into custody and deported in the manner provided by law. The provisions of this section shall be applicable to the classes of aliens mentioned in this act, irrespective of the time of their entry into the United States. (54 Stat. 673; 8 U. S. C. § 137[g].)

Section 1 of the Act thus referred to, enumerates the following aliens, among others:

> Aliens who * * * are members of or affiliated with any organization, association, society, or group, that believes in, advises, advocates, or teaches: (1) The overthrow by force or violence of the Government of the United States * * * (3) The unlawful damage, injury or destruction of property, or (4) sabotage— (41 Stat. 1009; 8 U. S. C. § 137[c]).
>
> Aliens who are members of or affiliated with any organization, association, society, or group, that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed,

published, or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue, or display, any written or printed matter of the character described in paragraph (d). (41 Stat. 1009; 8 U. S. C. § 137[e].)

The text of the statute and of the pertinent Regulations of the Immigration and Naturalization Service appear in the appendix to this Brief (*infra*, pp. 105-23).

QUESTIONS PRESENTED

The questions presented, in part, reach deeply into the heart of administrative justice, operating—in the treacherous field of belief and advocacy—under a statutory delegation of far-reaching power over the destiny of more than three and a half million aliens. These are whether, in arriving at factual conclusions upon the evidence in this record, on issues of membership and affiliation in organizations supposed to believe in and advocate forbidden doctrine, the standards have been appropriate and appropriately applied; and whether, from a reading of the procedures here used to arrive at the result, there emerges a record that challenges the standards of procedural due process which have become inseparably welded to "the cherished judicial tradition embodying the basic concepts of fair play".[3]

In other part, the questions presented uncover crucial issues of constitutional law. The statute, said to support deportation here, is challenged as invalid in its construction and application because it offends guarantees of free speech, free assembly and of liberty embodied in the Bill of Rights and bears no reasonable relation to the purpose for which governmental power to deport exists. The Government's contention that an alien may be deported "for

[3] *Morgan* v. *United States*, 304 U. S. 1, 22.

utterances, beliefs or associations in which he would be protected from punishment by the First Amendment",[4] strikes decisively at the "area of allowable thought",[5] of allowable assembly and of allowable liberty of three and a half million aliens lawfully resident in this country.

STATEMENT

1

Background of Case

This comes here in the appearance of a proceeding to deport an alien charged with being a member and affiliate of a subversive organization. But its appearance covers over many troublesome facets of American life. These facets have place here because the case against Bridges springs from his emergence more than a decade ago as an important labor leader at a time and on a scene of historic industrial conflict. Hence, to do justice here under the law and the constitution, these must be taken into account. The evidence and the history of this case must be viewed together and in context.

Bridges, prior to 1933, an undistinguished, anonymous longshoreman, is today, as he has been since 1934, an important leader of American labor (R. 84).[6] He first came to authority among workingmen in 1933-4, a turbulent period on the west coast waterfront. In few sectors of American industry were conditions of work as oppressive

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[4] Government Brief below, p. 20.

[5] *Schneiderman* v. *United States*, 320 U. S. 118, 139.

[6] Bridges is president of the International Longshoremen and Warehousemen's Union, director for the State of California of the Congress of Industrial Organizations, a member of the National Executive Board of the CIO, and a member of various CIO committees (R. 5883).

as here to the basic rights of workers. The "black list," the "shape-up", the "kickback", the "company union", the "speed-up" (R. 234-5),—these suggest the industrial jungle of the west coast waterfront in 1933. In June 1933, Bridges joined the International Longshoremen's Association (I.L.A.), a union affiliated with the American Federation of Labor; by October 1933 this Union was newly revived and militant; early 1934 saw the organization of a coast committee for maritime workers' unions, and May of that year, the decisive strike (R. 235-7).

> "The I.L.A., the longshoremen's union of which Bridges was an influential member, was a legitimate union, with legitimate grievances. The strike was legitimately directed to removing the grievances. It did. * * * That much is unquestioned." (R. 421).

Bridges emerged from the strike, settled July 31, 1934, "as a recognized leader in the Pacific Coast labor movement" (R. 237).

But Bridges also emerged as the outstanding target of union haters. "He became, so to speak," observed Judge Healy below, "a storm center of bitter industrial controversy, accumulating many enemies and earning the hostility of powerful interests" (R. 7796). For this the documentation is rich.

On February 2, 1935, the District Director of the Immigration and Naturalization Service of San Francisco reported:

> "* * * I have maintained a very close contact with the crime prevention detail from a period long antedating the general strike in S. F. until the present date. I, therefore, know that the officers of said detail have made constant effort to obtain evidence that would in any way connect the alien with radical organizations, or show his membership therein, but with the results heretofore set forth" (R. 660).

A 1936 memorandum for the Commissioner of Immigration, signed by the legal advisor to the Service, a member of the Board of Review and the Chief Examiner, says:

> "* * * Mr. Knowles reverts again and again to the case of Harry Bridges, leader of the S. F. Waterfront strike and the general strike of 1934, whose deportation was then and later urgently sought by the interests which he had antagonized.[7] His record has been exhaustively investigated * * *" (R. 659).

Commissioner of Immigration David W. McCormack, testifying on February 28, 1936 before a sub-committee of the House Appropriations Committee,[8] said:

> "The San Francisco Police Department has followed him [Bridges] unremittingly for years, and our men have also."

The result of the first,—"constant effort to obtain evidence", the second,—"exhaustively investigated", the third,—"followed him unremittingly"? Simply, "failed to show that he is in any manner connected with the Communist Party or with any radical organization" (R. 660), "invariably * * * found that he was in the clear, and that his status as an immigrant was entirely regular" (R. 661), "there is no shred of evidence in our files or in the files of the San Francisco Police Department to indicate that he is in any way subject to the provisions of the immigration law because of his radical views".[9] Yet,

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[7] The wide range of persons and organizations so involved is described in Dean Landis' opinion (*infra*, pp. 8-9) at R. 551-3; the Associated Farmers; the Industrial Association of San Francisco; the police departments of Los Angeles and Portland; several private undercover agents; a division of the American Legion under Harper Knowles; etc. See also Judge Healy, dissenting below at R. 7796-7.

[8] 74th Cong., 2nd. Sess., in hearings before Appropriations Subcommittee (1936) 99-100.

[9] *Supra*, note 8.

on the issue of affiliation in this case (tried in 1941), virtually every crucial item of testimony as to Bridges' activity is placed in the period 1933-1936, the very period of these constant, exhaustive and unremitting investigations.

But the "hostility of powerful interests," to use Judge Healy's phrase, was irreconcilable. Its influence persisted. The result,—a warrant in March 1938, seeking Bridges' deportation on the ground that he was a member and affiliate of a proscribed organization.

Because in *Kessler* v. *Strecker*; 307 U. S. 22, decided in 1939, this Court held that statutory authority for deportation requires a finding of membership or affiliation at the time of issuance of the warrant, the 1938 warrant was amended to charge that he "was and is" such member or affiliate (R. 503). Before the hearings opened, a resolution was introduced in the House, but failed of passage, to impeach the Secretary of Labor and other officers in her department for supposed conspiracy to refrain from enforcing the deportation law against Bridges.[10]

Beginning in July 1939, hearings on the 1938 warrant were conducted before Dean James M. Landis of the Harvard Law School, as trial examiner. They ran for eleven weeks; twenty witnesses were called by the Government and the testimony taken covers 7724 pages (R. 504). But the testimony of all the witnesses, given, as Dean Landis found, through a succession of perjurers, chronic liars and labor spies, was rejected.[11] He found no

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[10] H. Res. 67, 76th Cong., 1st Sess.; H. Rep. No. 311, 76th Cong., 1st Sess.

[11] He described one as a "self-confessed liar" (R. 521); the testimony of another as "almost unique" in "evasion, qualification and contradiction" (R. 549); another as having "almost pathological" tendency "toward prevarication" (R. 612); while another merely "lied when he dared to" (R. 556; see also R. 549, 588, 612, 556, 553, 571-2, 507, 375-6).

credible evidence for a conclusion that Bridges had *ever* been a member or affiliate of the Communist Party and, therefore, concluded that he was not a member or affiliate at the time the warrant issued. The report of Dean Landis and his proposed findings were accepted by Secretary Perkins and the warrant of arrest was cancelled January 8, 1940. (R. 75).

The "hostility of powerful interests" was still irreconcilable; it joined other like forces in the 1940 Congress. Together they drove first against radical aliens, then against all aliens, and, finally, and logically, against radical citizens.

> "Once Congress had lashed itself into such anger against supposedly subversive aliens, it is small wonder that it made a clean job by throwing citizens into the statute too. Representative T. F. Ford of California remarked during the debate:
>
> > 'The mood of the House is such that if you brought in the Ten Commandments today and asked for their repeal and attached to that request an alien law, you could get it.'"
>
> Chafee, Free Speech in the United States, 1941, p. 446.

Bridges was the unwilling gadfly. Witness: a bill to deport any alien who has used or uses the support of communists so as to interfere "with the good order and happiness of any local community, or with the established democratic, economic or domestic relations within this Republic."[12] Witness: a proposal to name the Communist Party specifically as an organization, membership

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[12] H. R. 8310, 76th Cong., 3d Sess.

in which would be ground for deportation.[13] Witness: a bill actually passed by the House by a vote of 330 to 42 (only to die in Senate committee), splendidly to the point, directing the Attorney General "notwithstanding any other provision of law" forthwith to take into custody and deport Harry Bridges, an Australian, "whose presence in this country the Congress deems hurtful".[14] Finally, witness: a bill that did become law on June 28, 1940, the so-called Alien Registration Act, the first such law since the Alien and Sedition Act of 1798. Among other things (see Chafee, Free Speech in the United States, 1941, pp. 446 *et seq.*) this law in its Section 23 nullified this Court's decision in the *Strecker* case (*supra*) by requiring deportation of an alien who "has at any time" after entry (no longer necessarily at the time of the warrant) been a member or affiliate of a proscribed organization. "* * * after this bill becomes law it will be perfectly clear that any alien * * * if at the time of his entry or at any time thereafter he has been, even for 1 minute a member of such an organization, he shall

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[13] H. R. 3455, 77th Cong., 1st Sess.

[14] H. R. 9766, 76th Cong., 3rd Sess., Senator Russell, Chairman. Committee on Immigration, received a communication from Attorney General (now Mr. Justice) Jackson which said, in part:

> "If this bill were to become law it would be an historical departure from an unbroken American practice and tradition. It would be the first time that an Act of Congress has singled out a named individual for deportation. It would be the first deportation in which the alien was not even accused either of unlawful entry or of unlawful conduct while here. It would be the first time that Congress, without changing the general law, simply suspended all laws which protect a named individual and directed the Attorney General to disregard them and forthwith to deport 'notwithstanding any other provision of law.' And it would be the first time since the Alien and Sedition Laws a century and a half ago that any law would provide for a deportation without a hearing, or without, indeed, the slightest pretense toward giving the accused what our Nation has long known as 'due process of law'." (S. Rep. No. 2031, 76th Cong., 3rd Sess., p. 9.)

be deported." [15] This provision was quite frankly aimed at Bridges. Said Congressman Hobbs, the author of the bill:[16]

> "It is my joy to announce that this bill will do, in a perfectly legal and constitutional manner, what the bill specifically aimed at the deportation of Harry Bridges seeks to accomplish. This bill changes the law so that the Department of Justice should now have little trouble in deporting Bridges. * * * ". (86 Cong. Rec. 9031).

Accordingly, on February 12, 1941, a new warrant of arrest issued,[17] premised on the June 1940 amendment of the deportation statute. This time, it was said, the issue was altogether different, namely, not Bridges' membership or affiliation at the time of the issuance of the warrant, but his membership or affiliation at any time since entry. There was a cavalier oversight—the sweep of the 1939 Landis hearing had, in truth, embraced the whole period of Bridges' residence in this country.

Hearings were held on the new warrant before former Judge Charles B. Sears. They were of the same magnitude as before Dean Landis. Nineteen witnesses were called by the Government and equivalent time was consumed and testimony taken—2½ months and 7546 pages (R. 143-4). New witnesses there were, but the subject matter of the testimony was substantially the same as that presented be-

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[15] Statement by Mr. Hobbs at the time he called up the conference report on the bill, 86 Cong. Rec., p. 9032.

[16] See hearing before a Sub-committee of the Committee on the Judiciary, U. S. Senate, 76th Cong., 3d Sess. on H. R. 5138, p. 11.

[17] This time not by the Department of Labor, but by the Department of Justice. Under the President's Reorganization Plan V, effective June 14, 1940 (8. U. S. C. A. § 102) the Immigration and Naturalization Service was transferred from the Department of Labor to the Department of Justice (5 U. S. C. A. § 133t note; cf. 8 U. S. C. A. § 100 and 101, notes).

fore Dean Landis. On the issue of membership, Judge Sears credited only one witness, if we exclude the testimony of two departmental employees concerning the unsworn, unsigned statement of another witness which that witness himself, when sworn, denied having made. On the issue of affiliation he relied primarily upon incidents rooted in Bridges' leadership of the 1934 waterfront strike, substantially all of which had been before Landis. Nevertheless, Judge Sears—different from Dean Landis—drew conclusions bringing Bridges within the statute.

The recommendations of Judge Sears were reviewed by the Board of Immigration Appeals,[18] Department of Justice, and were rejected by unanimous vote of the Board (R. 367-492). The Board delivered a comprehensive written opinion. The warrant of arrest was ordered cancelled and the case closed. Execution of the order was stayed "pending further order of the Attorney General or of this Board" (R. 492).

The Attorney General, without notice that he assumed jurisdiction of the case, and without providing Bridges an opportunity to be heard, reversed the decision and order of the Board and directed his deportation (R. 67-110). A petition for a hearing before him was promptly filed, and was denied by him four days later (R. 679-87).

We refrain from ourselves characterizing this background. We suggest the characterization made by others:

> "Seldom has an individual in American life been subjected to so relentless a hunt; and so far the law

[18] This Board is in the Office of the Attorney General, independent of the Immigration and Naturalization Service. The Board has authority "in behalf of the Attorney General" "to issue orders of deportation after proceedings in accordance with law and regulations; to order the cancellation of warrants of arrest issued in such proceedings; and in connection therewith to exercise such of the discretion conferred upon the Attorney General by law as is appropriate to the disposition of deportation proceedings." (Rules, § 90.3, See Appendix, p. 108.)

has been one of the most effective weapons at the disposal of Bridges' enemies." *In re Harry Bridges*, 52 Yale Law Journal 108, 129.

We turn to a summary review of the evidence relied on and findings made in the present proceeding.

2

Evidence and Findings

The Attorney General said (R. 90):

> "Judge Sears examines in detail the evidence of fifteen witnesses as bearing on Bridges' membership in or affiliation with the Communist Party. Much of this evidence is rejected as being untrustworthy, contradictory or unreliable. However, the evidence of two witnesses is accepted as showing that Bridges was a member of the party. If this evidence is believed—and Judge Sears believed it—the doubt is decided."

Of these thirteen rejected witnesses, the testimony of six was taken by Judge Sears and the Attorney General as indicating a "sympathetic attitude" towards communists (R. 96-7; 271; 272; 287; 288; 291; 326-7). The remaining seven rejected witnesses had testified to Bridges' supposed attendance at communist meetings; these were characterized by the Attorney General, generally, as "inconclusive, unreliable or contradictory" (R. 97), and by Judge Sears, with particularity, as "not impressive" (R. 295), containing "conflicts" and "not established" (R. 300), "too much chance of mistake in identification" (R. 302), "at times • • • he clearly falsified" and his testimony is "without value"; "I cannot tell where the truth lies in any uncorroborated statement of Cannalonga" (R. 307-8), "inherently improbable", "deep seated and violent bias" (R. 310), "indefinite" and "somewhat self-contradictory" (R.

312) and "not established" (R. 317). As to these last seven witnesses, however, the Attorney General stated (R. 98):

> "Although Judge Sears concluded that their evidence, for one reason or another, did not establish membership in or affiliation with the Communist Party, taken as a whole it cannot, because of its volume, be completely disregarded."

The two witnesses who—out of fifteen—were, according to the Attorney General, "accepted" and found not to be "untrustworthy, contradictory, or unreliable" (R. 90) were:

(a) Harry Lundeberg, a west coast American Federation of Labor labor leader, by his own admission "a biased witness" (R. 474) bearing "embittered" "enmity" (R. 468, 475) towards Bridges, who testified, in flat contradiction of statements he gave to government investigators on three previous occasions, that in the summer of 1935, six years earlier, Bridges had remarked that he was a member; and

(b) James D. O'Neil, who, on the stand, denied he had previously made an unsworn, unsigned statement to government investigators to the effect that he saw Bridges pasting assessment stamps in a party book. O'Neil's denial on the stand, under oath, was found false, but his prior statement, unsworn, unsigned hearsay, untested by cross-examination, admitted in conceded violation of the "published Departmental Regulations" (R. 95), was found true.

The Board of Immigration Appeals, which, naturally, considered in detail only Lundeberg and O'Neil, rejected these two also. Lundeberg was found "not worthy of belief" (R. 375) on the record. With respect to O'Neil his unsigned, unsworn, out of court statement, which on the

stand he denied having made, was found not only "not worthy of belief" (R. 375) on the record, but its admission as affirmative, probative evidence was held a violation of published Departmental regulations and also reversible error on other obvious evidentiary grounds (R. 446).

* * * * *

The pivotal evidence on "affiliation" in the Marine Workers Industrial Union (MWIU) related to Bridges' connection with the "Waterfront Worker", a mimeographed paper published in San Francisco from December 1932 until sometime in 1936, comprising no more than a collection of news items, essays and letters, prepared without headquarters, without consistently supervised policies, and without editing of submitted articles. Its so-called editors, some eight or ten in number, sometimes mailed in their own contributions; the staff did not remain constant, format varied, and publication days were irregular (R. 381 fn., 396, 5766-8, 6130-4, 6163-6, 6173-7). Bridges testified that he had been one of numerous longshoremen who took over this publication in September 1933 after it left MWIU sponsorship, and that this group of longshoremen edited it wholly independently of assistance from the MWIU. This testimony of Bridges is not controverted by any other testimony and there is no claim that the paper's content was subversive. But resting, nevertheless, upon supposed internal inconsistencies in Bridges' testimony and upon inconsistencies thought to appear between that testimony and the character of the paper as revealed by examination of the numbers introduced in evidence, Judge Sears and the Attorney General found that Bridges was an editor of the paper during the period of its conceded sponsorship by the MWIU (December 1932-August 1933); that further, there was no change in affiliation with the MWIU or the Party even after August 1933 until the time of the discontinuance of the paper in 1936; that, consequently, a forbidden affiliation by Bridges is demonstrated.

In contradiction to these findings, the Board of Immigration Appeals found that Bridges became associated with the Waterfront Worker only after it left MWIU sponsorship in September 1933 (R. 402), and that during the period of his association with the paper, it was not involved in any forbidden relationship (R. 420).

The administrative findings of the Attorney General rested also, though in far lesser part, upon other incidents which "in the main * * * cluster about the 1934 West Coast marine strike" (R. 89, 249, 421). The first was evidence of cooperation between the Longshoremen's Union and the MWIU, both of which were on strike; another was Bridges' opposition during the strike to a resolution by his own union "repudiating all Communist Organizations" (R. 250); and the third was the longshoremen's "acceptance of the services of the Western Worker, the Communist Party newspaper, to help the strike by publishing a daily strike bulletin free of charge" (R. 89). Some reliance is also placed upon the fact that in writings of "apologists" for the Communist Party, "its part in the strike is made larger by unsupported insinuation of association with the San Francisco labor leader, Bridges" (R. 425). The Board of Immigration Appeals, on the contrary, found that none of these items amounted to "some substantial evidence pointing toward affiliation or membership" (R. 426), saying:

> "Bridges and his union accepted MWIU support when it was useful to their union ends, helped the MWIU to get members only in order to help themselves, refused MWIU support when in their judgment such support was not helpful to their union ends, and finally, indeed, assisted MWIU only to its grave" (R. 424).

* * * * *

The forbidden membership or affiliation under the statute is not in the Communist Party, as such, but in an or-

ganization "that believes in, advises, advocates or teaches the overthrow, by force or violence, of the Government of the United States." The evidence primarily relied upon by Judge Sears and the Attorney General for proving that membership in the Communist Party of the United States was so forbidden consists of excerpts from three documents: The Communist Manifesto of Marx and Engels, published in Germany in 1848; State and Revolution, by Lenin, first published in Russia in 1917; and The Theses and Statutes of the Third International, first published in Russia in 1920 (R. 80-1). The oral evidence of government witnesses and an issue of the magazine "The Communist" dated July, 1921 were accepted as proving that the teachings of these documents were imparted by the Communist Party of the United States to its members (R. 81). Specifically upon this evidence was rested the general finding of the Attorney General that the Communist Party of the United States, from the time of its inception in 1919 to the present time, has been and is an organization that advocates overthrow, by force or violence, of the Government of the United States (R. 103-4).[19]

Neither the Attorney General, nor Judge Sears had drawn any conclusion or made any finding that advocacy by the Party of supposed forbidden doctrine, at any time during the relevant period, presented a clear and present danger of its realization. Indeed, Judge Sears plainly assumed the remoteness of any such danger. Thus, he concluded (R. 171-2), "the *ultimate* objective of Communism and of the Communist Party of the United States is that society shall be transformed", and that "this transformation can be accomplished only by the overthrow of all Capitalist Governments, the United States Government be-

[19] "Abundant" additional literature was introduced by the Government (R. 174). Of this the Attorney General said it was "to the same effect" (R. 81) as the documents thus referred to, but he made no findings of "underlying facts" with respect to them (*cf. Schneiderman* v. *United States*, 220 U. S. 118, 129-30).

ing in that category." The quotations Judge Sears relies upon from the oral testimony are of identical purport: The Communist Party policy was "to attract and influence this group of people to adopt their principles and *ultimately* join with them in the overthrow of the Government by force and violence" (R. 178); "all its aims are predicated to that *ultimate* aim" (R. 176); "*ultimately* use the unions for the purpose of accomplishing their *ultimate* aim and objective * * * which is—the overthrow of the Government of the United States" (R. 176-7).

* * * * *

The evidence relied upon by Judge Sears and the Attorney General for proving that affiliation with the Marine Workers Industrial Union was a forbidden relationship rested upon (1) this Union's affiliation with the Trade Union Unity League, in turn said to be "controlled directly by the Communist Party" (R. 204-8), and (2) doctrine set forth in the preamble to the membership book of the MWIU (R. 208). A forbidden relationship with this union was not charged in the 1939 hearing and was not charged in the warrant leading to the second hearing; it was first charged in the Government's opening statement in the second hearing (R. 808).

The reason for prior absence of the charge is obvious. The Commissioner of Immigration and Naturalization had ruled as long ago as January 1934, in conformity with the considered opinion of the Solicitor of the Department of Labor, that membership in a trade union was not ground for deportation merely because that union was affiliated with the Trade Union Unity League (R. 205). See *United States ex rel. Boric* v. *Marshall*, 290 U. S. 709 and R. 3689 *et seq.* An offer was made (but rejected) to prove that "despite the presence in the country of many thousands of members of such organizations, * * * since January 3, 1934, no proceeding has been instituted * * * to deport any alien for membership in or affiliation with the

Marine Workers Industrial Union" or any other union affiliated with the Trade Union Unity League (R. 148-9).

However, Judge Sears, in reliance upon testimony by the witness Honig that the Trade Union Unity League had not dissociated itself from the Red International of Labor Unions in 1933, but had only "ceased to acknowledge its affiliation" (R. 206), rejected the authority of the Service which had governed since January 1934.

The doctrinal material from the MWIU membership book independently relied upon for proof of forbidden doctrine had already been considered by Dean Landis in the first hearing; and this is what he said (R. 604):

> "Its constitution spoke in more radical and revolutionary terms of the necessity of remedying the plight of the worker and of the impossibility of doing so other than by resort to at least economic force. It dwelt upon the class struggle and the iniquities of the bosses in sharper and more bitter terms than the manner in which those subjects are today touched upon in the constitution of the American Federation of Labor. * * * It would be impossible on this record to determine the communistic or non-communistic character of the MWIU."[20]

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[20] Compare the preambles of the Constitutions of the MWIU and the American Federation of Labor (R. 604).

The MWIU preamble contains the following:

> "Victory in this struggle (the revolutionary struggle of the whole working class against the capitalist system) can be won only by the most relentless, militant, and revolutionary struggle for the whole working class. * * * It (the M.W.I.U.) rejects and condemns the treacherous class-collaboration policy of the A. F. of L. which seeks to delude the workers into believing that it is possible for them to live 'in peace' with the capitalists. * * *"

The American Federation of Labor preamble contains the following:

> "Whereas the struggle is going on in all the nations of the civilized world between the oppressors and the oppressed of all

(*Continued on following page*)

3

Opinions of the Courts Below

The District Court:

Judge Welsh said (R. 754-5):

"If the statements of James O'Neil had been the only proof upon which depended the attribution of Communist Party membership and affiliation to petitioner, I would not hesitate to find a complete want of substantial evidence to support the order of deportation on that ground. The statements testified to were unsigned and unsworn and there is no proof that O'Neil was asked to sign or swear thereto, or being asked, refused to do so. Consequently, their introduction in evidence, as affirmative proof of the facts allegedly stated was violative of controlling departmental regulations. (Sec. 150.1 (c) of the Regulations of the Department of Justice, Immigration and Naturalization Service). The fact that no objection was made to the use of the statements in evidence on that ground, would not seem to justify their introduction by the Government contrary to its own regulations. Moreover, the statements were pure hearsay. The opportunity of cross-examining O'Neil was entirely lacking because he denied having made any portion of the statements attributed to him which was damaging to petitioner. In my opinion, the requirements of a fair hearing would not have been fulfilled if

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countries, a struggle between the capitalist and the laborer, which grows in intensity from year to year and will work disastrous results to the toiling millions if they are not combined for mutual protection and benefit;

"It, therefore, behooves the representatives of the trade and labor unions of America in convention assembled, to adopt such measures and disseminate such principles among the mechanics and laborers of our country as will permanently unite them to secure the recognition of rights to which they are justly entitled."

> the order of deportation in this case had been based solely on this hearsay evidence, introduced in violation of departmental regulations, and consisting of proof of prior contradictory statements of a witness, offered as affirmative proof of the facts stated, with no opportunity of cross-examination being afforded the alien because the witness denies having made the statements attributed to him."

But the District Court denied the writ because it also found (1) Lundeberg's testimony not "so unsubstantial as to lend no support to a finding based thereon" (R. 756); (2) "other evidence * * * which, while not of itself sufficient to show proscribed membership and affiliation, does tend to lend credence to the testimony of Lundeberg that in 1935 petitioner had admitted to him Communist Party membership" (R. 756); and (3) the conclusion drawn from the evidence that Bridges' association with the Waterfront Worker amounted to a forbidden affiliation was not "unwarranted" (R. 757).

The Circuit Court of Appeals:

The majority opinion (three Judges) found (1) no "abuse of administrative discretion" in basing the finding of membership upon "the statement by Lundeberg that Bridges claimed to be a Communist", although it "falls into a class of evidence that is easily given and hard to refute" and "the danger of mistake * * * is undeniably present" (R. 7789-90), or in accepting the evidence of O'Neil, since there was other evidence (*i. e.*, Lundeberg) to support the finding; and (2) "there is evidence to support the findings of the Attorney General that the Marine Workers' Industrial Union was a part of the Communist Party and that appellant was affiliated with it during the period of the longshoremen's strike",—this notwithstanding the Court's further view, "It may be stated arguendo that appellant, in his management of that strike,

was attacking most vicious and inhumane practices toward longshoremen and *that he was justified in accepting help from any quarter*" (R. 7791, italics supplied).

Circuit Court Judge Stephens delivered a concurring opinion (joined in by Wilbur and Mathews, the other majority Judges) in which he said (R. 7794):

> "In no case have I given the evidence more careful attention than in this one. However, such attention has not left in my mind the pleasurable satisfaction that, barring a very slight possibility of error, the truth has been revealed. Such satisfaction is beside the point here. The simple question this court must answer is: Is there some evidence to sustain the charges? There is."

The dissenting opinion was written by Judge Healy, with concurrence of Judge Garrecht. The opinion observed that the finding of membership "rests upon two items of evidence" (R. 7799), saying as to the first item (Lundeberg), "proof here approaches, if it does not cross, the borderline of inadequacy" (R. 7804), and as to the second item (O'Neil), the admission of his unsworn, unsigned statement was not only incompetent, but "led to a denial of justice" (R. 7807). He concluded (R. 7809):

> "The infirmity of the O'Neil hearsay cuts across all rules. No amount of philosophizing can serve to make a silk purse out of this obvious sow's ear. Rather than deport the alien on evidence which would be condemned and proscribed without hesitation by any American court it would seem a more forthright procedure to do what was proposed in the first place, deport him by legislative resolution 'notwithstanding the provisions of any other law'."

The finding as to affiliation, he found "without substantial evidentiary support" (R. 7803).

4

The Alien, Bridges

There is no claim here that Bridges believed in forbidden doctrine, or that he advocated forbidden doctrine, or that he understood the Communist Party, an apparently legal political party, to believe in or advocate forbidden doctrine.[21] Deportation of Bridges rests only on the ground that he was found to have been associated, vaguely at some time prior to 1938, with a political party which, unknown to him, then believed in and advocated forbidden doctrine. The supposed forbidden beliefs and teachings of that political party are imputed to him.

And this "guilt by imputation" is fixed not at all because the record is barren of proof of doctrine and principles of action held by Bridges himself. On the contrary, Bridges' own trade union faith emerges from these extended hearings boldly. He sought support for his union in the 1934 strike in any quarter, and he took it where he found it; he found it with the MWIU but also he found it with the Teamsters, the Machinists, the Boilermakers (R. 422, 5785); he found it with the Western Worker (R. 6121-6), but he also found it with the Catholic Leader (R. 6485). He has friends and associates who are communists. He consistently attacked "red baiters" in the belief that they "are usually agents of the bosses and are the enemies of true trade unionists and should be treated with distrust" (R. 1130). He opposed purging unions of members simply because they were communists. Such suppression, he believed "tended too frequently to play into the hands of

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[21] The Government stated (R. 1527):

"* * * we are not charging this witness with believing in the advocacy of the overthrow of the Government of the United States by force and violence.

"We are not charging the alien here with believing in the use of force and violence in the overthrowing of the Government of the United States."

those who were outwardly battling against communism but inwardly directing their efforts under that facade toward the destruction of the trade-unionist movement" (R. 632-3).

If it be said, as Judge Sears said and as the Attorney General said, that these associations and expressions of views are "consistent" with the conclusion of forbidden affiliation, it must also be said that, by them, the conclusion is far from proven. But, much more important, they comprise only one segment of the record, which, if taken as a whole, points, with no less persuasion, "the other way" (R. 428). On this point the Board of Immigration Appeals gathered together from the record a valuable summary (R. 4572-7; 4908-9):

> "Bridges supported 'Ham and Eggs', a bitterly fought political issue in California. The Communist Party was opposed to it (6169). In the last election, Bridges supported the position taken by John L. Lewis—contrary to the attitude of the Communist Party (6169). He differed with Walter Stack, a prominent Communist, on the question of affiliating the Maritime Federation of the Pacific (apparently to the C. I. O.). Stack opposed it. Bridges was for it (6163-4). A committee of which Bridges was chairman investigated and rejected, during the 1934 strike, an offer of legal assistance from the International Labor Defense (5917-21), found by the Presiding Inspector (P. I. 71) to be a Communist organization whose 'immediate purpose is to assist and defend Communists who encounter legal difficulties by providing bail, lawyers, and other assistance.' Bridges was opposed to the position of the MWIU that longshoremen, teamsters, engineers and seamen should all be in one union (2578-9). He refused Jackson's invitations to join the MWIU (5754). His stated beliefs are in favor of collaboration between capital and labor (2570) and opposed to the Communist

policy of fomenting strikes (P. I. 46; 212; Gov. Ex. 239, pp. 60-3). Bridges believes in arbitration and direct negotiation to settle labor differences with the strike used only as a last resort (5519-23; 5527; 5530-2). That belief, according to other witnesses, has been practiced by Bridges with consistency."

The Attorney General states in perfect logic,—"Because Bridges was a 'good' labor leader, and thought that a communist could be a good labor man, hardly shows that Bridges was not a communist" (R. 101). The same logic should have kept the Attorney General from resting a finding that Bridges was a communist upon evidence that he was a good labor leader and thought a communist could be a good labor man. Bridges' standing as a good labor leader derives, in the beginning, out of his leadership of the 1934 waterfront strike. "I have no doubt", said even Judge Sears, "that Bridges' leadership was good in the eyes of his fellow-unionist. He helped to establish better employment and working conditions as a result of the 1934 strike. He undoubtedly greatly aided the maritime workers in securing higher wages. He is entitled to credit in these respects" (R. 325). Leadership during a strike comprises the leader's conduct of a strike—the associations and transactions necessary in his judgment to win it. And the record suggests no challenge to his judgment on this. Yet, concludes Judge Sears, from these associations and transactions—the very ones that made his leadership "good in the eyes of his fellow unionist"—"I find that Bridges was affiliated with the MWIU and the Communist Party at the time of the 1934 strike" (R. 255-6). And the Attorney General said: "I think this conclusion is not unwarranted" (R. 90).

On Bridges' political faith and convictions, Dean Landis summed up truly (R. 635):

"Bridges' own statement of his political beliefs and disbeliefs is important. It was given not only with-

out reserve but vigorously as dogma and faiths of which the man was proud and which represented in his mind the aims of his existence. It was a fighting apologia that refused to temper itself to the winds of caution. It was an avowal of sympathy with many of the objectives that the Communist Party at times has embraced, an expression of disbelief that the methods they wished to employ were as revolutionary as they generally seem, but it was unequivocal in its distrust of tactics other than those that are generally included within the concept of democratic methods. That Bridges' aims are energetically radical may be admitted, but the proof fails to establish that the methods he seeks to employ to realize them are other than those that the framework of democratic and constitutional government permits."

5.

Nature of Deportation

We defer discussion of relevant legal and constitutional doctrine, and its springs. Here we would only suggest the considerations of policy that must mould that doctrine.

It has been said, and there is no balder fiction, that deportation is a *mere* executive civil proceeding to determine whether an alien has forfeited the privilege of residence in this country. In the beguiling words of Judge Sears (R. 146):

> "Should he [Bridges] be found to come within a deportable class, he is not thereby adjudged in such a proceeding as this to have been guilty of criminal or even reprehensible conduct. A determination against him and a finding of ground for deportability *simply* means that he is found to have violated a condition of the privilege of remaining in this country, which he has been enjoying." (Italics supplied.)

Hence, it is said, many procedural safeguards included in judicial due process, civil or criminal, are not available. Hence, it is said, findings of fact, if supported by any evidence, are conclusive on the courts. Hence, it is said, the great substantive guarantees of the Bill of Rights are not available.

But life speaks differently. Bridges has lived here twenty-five years,—all his adult life. His ties, his friends, his work,—his roots are here. In the eyes of many good citizens, he has played a useful and important role in American progress. Now he is confronted with final separation from his family, his friends and his livelihood, with loss of all that makes life worth living, with banishment and exile. He is to be uprooted. This—because at some indefinite time in the indefinite past, he is found to have been associated with an organization holding supposed forbidden beliefs. In the determination of issues of belief, this Court has said, "proof is treacherous and objective judgment, even by the most disciplined minds, precarious." (*Baumgartner* v. *United States*, 322 U. S. 665, 675).

Surely, then, there is gravity in the decision, gravity of no less dimension than is implied in an attempt to reduce a person to the status of alien from that of citizen, and, certainly, gravity of no less dimension than is implied in the imposition of a fine or a jail sentence. There are over three million five hundred thousand aliens in this country, making up more than 3% of the total population (16th Census, 1940, Vol. 2, Part 1, p. 10). It is a fair presumption that many of these have been in this country for years, if not for the greater part of their lives. These people are an integral part of our population. They have established themselves and their families here; this is home to them.

We owe obligations to the alien lawfully admitted which the foreigner who has not been admitted cannot claim, and

we exact duties from the alien which we cannot from the unadmitted foreigner. The resident alien is subject to all our laws and, equally with the citizen, is subject to military service in defense of this country. (Selective Training and Service Act; 50 U. S. C. A., Sec. 303).

Is there not strong reason here for full play to "the presuppositions of the democratic faith"? Or shall the illusory promise of an easy formula in deportation cases —"mere executive civil proceeding"—replace the duty of exercising judgment and of searching for solid proof?

6

Assignments of Error

These will be discussed immediately hereafter. In view of that discussion, they will not be repeated here.

For an itemized list of the assignments of error see R. 7747-62.[23]

ARGUMENT

The argument will be under the following heads—representing the three major issues in the case:

I. Deportation upon this evidence offends due process of law.

II. Deportation upon these procedures offends due process of law.

III. The statute as construed and applied offends the Bill of Rights and bears no reasonable relation to the purpose for which governmental power to deport exists.

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[23] See also Exceptions to Proposed Findings, R. 348-365.

I

DEPORTATION UPON THIS EVIDENCE OFFENDS DUE PROCESS OF LAW.

"* * * facts do not assess themselves * * * the decisive element is the attitude appropriate for judgment." *Baumgartner* v. *United States*, 322 U. S. 665, 666-7.

1

What, then, is the attitude appropriate for judgment here? The majority below joined in this formulation of its attitude appropriate for judgment: "The single question this court must answer is: Is there some evidence to sustain the charges? There is" (R. 7794). On denial of the petition for rehearing the majority below amplified this formulation as follows (R. 7812):

> "Where there is evidence, more than a scintilla and not unbelievable upon its face, the administrative head must resolve the doubts as to its credibility."

The attitude appropriate for judgment adopted by the District Court Judge is reflected in this phrase: "the testimony" is not "so unsubstantial as to lend no support to a finding based thereon" (R. 756).

We contend that these are not attitudes appropriate for judgment here.

This is not a review of a judicial proceeding. Nor is it a statutory review from an administrative order. There happens to be no statutory procedure for judicial review from the Attorney General's order of deportation. But in the language of Mr. Justice Stone, speaking for the Court, in *Lloyd Sabaudo Societa* v. *Elting*, 287 U. S. 329, 335-336:

"The action of the Secretary is, nevertheless, subject to some judicial review, as the court below held. The courts may determine whether his action is within his statutory authority, compare *Gonzales* v. *Williams*, 192 U. S. 1, *Gegiow* v. *Uhl*, 239 U. S. 3, whether there was any evidence before him to support his determination, compare *Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103, and whether the procedure he adopted in making it satisfied elementary standards of fairness and reasonableness, essential to the due administration of the summary proceeding which Congress has authorized. *Compare Kwock Jan Fat* v. *White*, 253 U. S. 454; *Tang Tun* v. *Edsell*, 223 U. S. 673; *Chin Yow* v. *United States*, 208 U. S. 8, 12; *The Japanese Immigrant Case*, 189 U. S. 86, 100, 101; see *United States ex rel. Iorio* v. *Day*, 34 F. (2d) 929; *Whitfield* v. *Hanges*, 222 Fed. 745."

It will be noted that the Chief Justice relied upon no older case than *Vajtauer*, decided in 1927, to support his determination as to sufficiency of evidence. The reason is that the *Elting* and *Vajtauer* cases mark an historic development in the judicial doctrine of this Court. One need only compare them, for example, with *Nishimura Ekiu* v. *United States*, 142 U. S. 651, and *Fong Yue Ting* v. *United States*, 149 U. S. 698, which turned on a conception of the immigration agencies as independent tribunals possessing virtually final authority with respect to all matters of construction and application of the immigration laws.

Thus, the fact now is that, notwithstanding the lack of statutory review in deportation, the powers attributed to its agencies by Mr. Justice Stone in the *Elting* case "are not materially greater than the powers admittedly possessed by many administrative agencies over essential interests of citizens. And the restraints to which they are declared to be subject are not materially less." Report,

The Secretary of Labor's Committee on Administrative Procedure, 1940, page 45.

And the *Elting* case viewed in this context is not static. It is to be read as in conformity with today's standards of judicial review of administrative findings of fact. These are clear. This Court must be satisfied that substantial evidence, of a quality to carry conviction to a reasonable mind, supports the crucial findings. We confine quotation to extracts from one decision in this Court and one decision in the Circuit Court of Appeals for the 9th Circuit.

> "Section 10(e) of the Act provides: '* * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive.' But as has often been pointed out, this, as in the case of other findings by administrative bodies, means evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred * * * Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. 'It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,' * * * and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." (*NLRB* v. *Columbian Enameling & Stamping Co.*, 306 U. S. 292, 299-300.)

> "It is suggested that this court should accept the findings of the Board; that contradictions, inconsistencies, and erroneous inferences are immune from criticism or attack by Section 10(e) of the Act * * * 29 USCA §160(e), which provides that 'the findings of the Board as to the facts, if supported by evidence, shall be conclusive'. But the courts have not construed this language as compelling the acceptance of

findings arrived at by accepting part of the evidence and totally disregarding other convincing evidence • • •

"'Substantial evidence' means more than a mere scintilla. It is of substantial and relevant consequence and excludes vague, uncertain, or irrelevant matter. It implies a quality of proof which induces conviction and makes an impression on reason. It means that the one weighing the evidence takes into consideration all the facts presented to him and all reasonable inferences, deductions and conclusions to be drawn therefrom and, considering them in their entirety and relation to each other, arrives at a fixed conviction.

"'The rule of substantial evidence is one of fundamental importance and is the dividing line between law and arbitrary power. Testimony is the raw material out of which we construct truth and, unless all of it is weighed in its totality, errors will result and great injustices be wrought.' *National Labor Relations Board* v. *Thompson Products Inc.*, 6 Cir., 97 Fed. (2d) 13, 15." (*NLRB* v. *Union Pacific Stages*, 99 Fed. (2d) 153, 177 (CCA 9).)

For deportation cases in accord, see: *Strecker* v. *Kessler*, 95 F. (2d) 976 (C. C. A. 5), affirmed on another ground, 307 U. S. 22, 34; *Sullivan ex rel. Jee Gim Bew* v. *Tillinghast*, 28 F. (2d) 612 (C. C. A. 1st, 1928); *Mason ex rel. Lee Wing You* v. *Tillinghast*, 27 F. (2d) 580 (C. C. A. 1st 1928); *Lisotta* v. *United States*, 3 F. (2d) 108 (C. C. A. 5th, 1924); *Katz* v. *Commissioner*, 245 Fed. 316 (C. C. A. 9th, 1917); *Lo Pong* v. *Dunn*, 235 Fed. 510 (C. C. A. 8th. 1916); *Ong Chew Lung* v. *Burnett*, 232 Fed. 853 (C. C. A. 9th, 1916); *Whitfield* v. *Hanges*, 222 Fed. 745; *Ex Parte Radivoeff*, 278 F. 227, 231. See 2 Monthly Review, Immigration and Naturalization Service, 87, Jan. 1945.

A consideration which frequently comes into play in a determination to give approval to administrative findings of fact, namely, the assumed expertness and special competence of the fact-finder, operates here only to justify rejection of the administrator's action. The two fact-finders—Judge Sears and the Attorney General, who stand behind the deportation order,—claim neither expertness nor special competence in the field of administration of the deportation statutes. The relevant expertness and competency here may be presumed to lie only with the Board of Immigration Appeals because the Departmental Regulations have assigned to the Board the statutory authority of the Attorney General to issue orders of deportation and to order cancellation of warrants. Thus the fact here is that the only administrative body that may justly be said to have applied especially informed judgment and expertise to the record here has made findings which call for cancellation of the warrant.

Nor may we forget that this is a deportation case and its pivotal issue is imputed belief. *Baumgartner* v. *United States*, 322 U. S. 665, and *Schneiderman* v. *United States*, 320 U. S. 118, involve cancellation of citizenship,—but what were some of the pervading grounds for their rule that the evidence must be "so clear, unequivocal and convincing" as not to leave "the issue in doubt"? These: An attempt to reduce a person to the status of alien from that of citizen is one of utmost "gravity"; revocation of citizenship presents a different problem from denial of citizenship, for "new relationships and new interests flow once citizenship has been granted. All that should not be undone unless the proof is compelling that that which was granted was obtained in defiance of Congressional authority"; finally, when denaturalization turns on issues of belief, especially imputed belief (See *Schneiderman, supra* at p. 154) "proof is treacherous and objective judgment, even by the most disciplined minds, precarious. That is why denaturalization on this score calls for weighty proof * * *" (*Baumgartner supra* at p. 675).

'Need we transpose these considerations—tendered in a denaturalization case—to the case at bar to show that any difference in their application to the case at bar is surely not measurable? Deportation, no less than denaturalization, is a fate of utmost "gravity". ' President Madison, a framer of our Constitution said (4 Elliot, Deb. 555):

> "If the banishment of an alien from a country into which he has been invited as the asylum most auspicious to his happiness,—a country where he may have formed the most tender connections; where he may have invested his entire property, and acquired property of the real and permanent, as well as of the movable and temporary kind; where he enjoys, under the laws, a greater share of the blessings of personal security, and personal liberty, than he can elsewhere hope for; * * *—if a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied."

Just as denaturalization presents a different problem from naturalization, so deportation presents a different problem from exclusion. Deportation, no less than denaturalization, seeks to undo the "new relationships and new interests" which flow from prolonged residence in this country. Finally, this case, like *Baumgartner* turns on issues of belief and, like *Schneiderman*, on issues of imputed belief. In this case, no less than in those, "proof is treacherous and objective judgment, even by the most disciplined minds, precarious".

But whether the standards be "solid proof which leaves no troubling doubt" or "weighty proof" or "clear, unequivocal and convincing" proof or "sufficiently compelling proof" (as in denaturalization), or "substantial evidence", it has not been applied. Indeed, the court below,

here, unlike the court below in *Baumgartner*, did not even profess to apply it. On this ground alone, its decision must be upset. The situation would, of course, be no different even if the court below had professed to apply it, for ascertainment by the lower courts that an appropriate standard of proof has been satisfied on the whole record is also open to review here (*Baumgartner* v. *U. S. supra*, 671.)

We turn then to a consideration of the evidence "in the context in which that evidence is to be judged". And first, as to alleged membership of Bridges in the Communist Party, upon which the Government acknowledged below, this deportation "order rests basically" (Government Brief, below, p. 23):

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Out of fifteen witnesses, said the Attorney General in adopting the report of Judge Sears, "the evidence of two witnesses is accepted as showing that Bridges was a member of the Party" and "much" of the rest "rejected" as being "untrustworthy, contradictory or unreliable" (R. 90). The surviving testimony was of O'Neil and Lundeberg. We deal first with O'Neil, characterized by the Board of Immigration Appeals and by Judge Healy below as "a theatrical, sensation loving braggart" (R. 7804).

Counsel for the Service read to O'Neil, in the course of his direct examination, a statement alleged to have been made by him to agents of the F. B. I. in an interview on October 7, 1940. The material parts of the statement read into the record are (R. 3109-13):

> "On another occasion I walked into Bridges' office, it always being my privilege to do so after first having assured myself that he was alone, and there on his desk was a new Party book, which had just been issued and into which Bridges was putting assessment stamps.

This was about two o'clock in the afternoon in Bridges' office in the Balboa Building, 593 Market Street, Room 509, in 1937. I expressed amazement that he was doing this openly with the book in plain view on top of his desk; however, he nonchalantly continued to put the stamps in place and then returned the book to his pocket. I knew this was a Communist Party book because I had one myself and it was just like it. It was the general practice to pay your dues to the Communist Party dues collector and, in return, to receive stamps which he tore off from a block and which you inserted in your book at your leisure. There is no doubt in my mind but what that was Bridges' membership book in the Communist Party.

* * * * *

"On several occasions Bridges reminded me that I had not been attending [Communist] Party meetings and asked me, 'What's the score?'.

* * * * * *

"It is my belief that Bridges never at any time attended any Communist Party meetings. He might have met with one or two of the trusted and highest officials of the Party, as that would be all that would be necessary to conduct any business he had with them.

"Bridges never stated to me that he was a member of the Communist Party. It was always tacitly understood and assumed that such was the case * * *

* * * * *

"* * * Bridges said that fraction meetings had been conducted in the room [Bridges' hotel room]. * * * By this he meant top fraction meetings of the Communist Party. * * *"

O'Neil on the stand, under oath, denied making and denied the truth of all the statements above quoted, with the exception of the sentence: "It is my belief that Bridges

never at any time attended any Communist Party meetings" (R. 3024).

Gertrude Segerstrom, an F. B. I. stenographer, testified as to the contents of the statement above quoted, which, she said, she took on dictation from O'Neil in the presence of two F. B. I. agents (R. 3103).

Major Schofield, head of the Service, testified that the following occurred in an interview at the F. B. I. office on April 22, 1941, a few days before O'Neil testified, in the presence of himself and three other representatives of the Department (R. 437):

> "He [O'Neil] was asked whether he had been a Communist and stated he had been a member of the Communist Party and had been active in its behalf here in San Francisco. He was asked whether or not Harry Bridges was a member of the Communist Party, and he said he was. He then said and volunteered this: That he, O'Neil, so far as he knew, was the only man who had visual evidence of the fact that Bridges was a Communist. We asked him what he meant by that, and he said that on one occasion he had actually seen Bridges pasting dues stamps in Bridges' membership book in the Communist Party."

It was found that, notwithstanding O'Neil's denial under oath, these statements were made to the stenographer Segerstrom and to Major Schofield. And it was also found by Judge Sears (who admitted the statements for impeachment only—R. 5256-7)[23] that the testimony of Seger-

[23] To an objection that the Government was improperly impeaching its own witness, the Inspector said: "I will take it. I think they may impeach their own witness. Of course, it isn't original proof of the matter" (R. 5256-7). Because the Inspector later indicated some uncertainty on the point, Bridges' denial was entered to protect him against the possible use of O'Neil's statement as affirmative evidence (R. 5880-3).

strom and Schofield proved O'Neil's prior statements and they constituted affirmative probative evidence in support of the Service's case. Judge Sears considered the O'Neil prior statements as "substantive proof", as "substantial evidence" (R. 269), as "truth" (R. 271) and found "in accordance therewith that Bridges was in 1937, a member of the Communist Party" (R. 271).

The Board of Immigration Appeals held that such use of the statements was forbidden (1) as improper under the published Departmental Regulations (R. 446), (2) as improper because the alien had no opportunity to cross examine as to the truth of the statements denied and so was deprived of "cross examination on highly material evidence at the very heart of the case" (R. 452-3), adding in support of this view (R. 458-9):

> "Some hearsay is undoubtedly permissible in deportation proceedings, to what extent and under what circumstances we need not, and cannot decide here, for the nature of the subject allows of no rule of thumb. Suffice it as to the state of the authorities that no authority is cited, and we find none, that sanctions the reception in administrative deportation proceedings of unsworn, prior contradictory statements the making of which is denied on the stand."

and (3) "in any event, those statements are, on the record here, not credible, and we so find" (R. 462).

The Attorney General rejected the decision of the Board of Immigration Appeals and accepted the recommendation of Judge Sears. Thus, prior unsworn, unsigned hearsay, untested by cross examination, admitted in avowed violation of the published Departmental Regulations, was found true and was found "substantive", "substantial" proof, but denial on the stand under oath by the alleged maker of the statements that he ever did make them, was found false.

But the Attorney General was wrong on his ground and on any grounds. The District Court below has already said so with all the vigor at its command (R. 754, quoted *supra*, pp. 20-1). The majority below did not dispute the District Court's view; and as to the dissenting Judges in the court below, one sentence at least from Judge Healy's opinion justifies repeating:

> "Rather than deport the alien on evidence which would be condemned and proscribed without hesitation by any American court it would seem a more forthright procedure to do what was proposed in the first place, deport him by legislative resolution 'notwithstanding the provisions of any other law'."

The published Regulations of the Department are reprinted in the Appendix to this Brief.

The reading of these provisions by the Board of Immigration Appeals is as authoritative as it is unassailable (R. 449-50):

> "It is clear from the provisions of Section 150.1(c)(d) that the investigating officer in obtaining a 'recorded statement,' that is, a statement 'taken down in writing,' must seek by specific request to obtain the statement over the signature of the maker and by interrogation under oath (or affirmation). When Section 150.6(i)(c)(d) is fairly read in conjunction with Section 150.1 it is such a 'recorded statement,' so safeguarded, that is permitted as evidence under Section 150.6(i) when the maker of the statement gives contradictory testimony on the stand. The O'Neil statement testified to by Major Schofield was received as an oral statement. Neither the O'Neil statement to Major Schofield, nor the O'Neil statement to Segerstrom was by interrogation under oath; neither was signed by O'Neil; and in neither case is there any showing that O'Neil was asked to swear

and sign, or that being asked he refused to swear and sign (2430-1)."

The Attorney General himself agreed with the Board's reading of the Regulations, saying (R. 95):

> "Had the alien raised the question at the time of the hearing, compliance with the Departmental Regulations would have been obligatory and a deliberate rejection of a request to exclude the testimony would have rendered appropriate the objections now raised by the Board."

However, he also said (R. 95-6):

> "No objection having been raised by the alien throughout the hearing, however, he waived the right to object on the technical ground that the statement was not taken in accordance with the rules."[23a]

One answer to the Attorney General's point of waiver is that the defect was more than "technical." Another answer is that even had this specific defect been called to Judge Sears' attention, obviously it could not have been cured. Again, Judge Sears was not unaware of objections on the broadest grounds by the alien's counsel. He said in his report (R. 267):

> "It was strenuously urged by Counsel for the alien at the hearing, and similar argument is made in the alien's brief, that the admission of the statement taken by Mrs. Segerstrom was error and that the statement itself, under the circumstances, was without probative value, and that the testimony of Major Schofield was erroneously received and was without probative value."

Finally, the Board of Appeals, the original *deciding* body (as distinguished from Judge Sears, merely a recommend-

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[23a] The rule is *contra*. *Svarney* v. *United States*, 7 F. (2d) 515, 518, *cf. Ex Parte Radivoeff*, 278 F. 227.

ing body) was made aware of the specific objection. And so, obviously, was the Attorney General. Thus, the conclusive answer to the point of waiver raised by the Attorney General is the one given by Judge Healy, below (R. 780-6):

> "The rules, adopted as they were under authority and direction of law, are part and parcel of the regulations 'governing the arrest and deportation of aliens'. They were disregarded here. The Attorney General so concedes in his decision. He excused their violation on the specious plea that they 'were not called to the attention of the presiding inspector.' However, they were called to the Attorney General's attention. One is left to wonder on what ground that high official condoned his own disregard of them. Upon him rested the inescapable responsibility of accepting or rejecting the evidence, as of ordering the deportation. The rules were obligatory on him if on anybody. To toss them aside for reasons deemed expedient in a particular case amounts to the substitution of a government of men for a government of law."

Disregard of published rules of the Service is error in a fundamental sense. These rules "in so far as consistent with law, are themselves law, and, be it noted, law for government—for the department—as well as for aliens. In connection with the general law of the land, the rules constitute for aliens in deportation proceedings the due process of law guaranteed by the federal Constitution to all men" (*Ex Parte Radivoeff*, 278 F. 227, 229). In *Bilokumsky* v. *Tod*, 263 U. S. 149, 155, Brandeis, J., wrote:

> "It may be assumed that one under investigation with a view to deportation is legally entitled to insist upon the observance of rules promulgated by the Secretary

[of Labor] pursuant to law" (citing many authorities in a footnote).[24]

The Attorney General would not agree with the Board of Appeals "that the fundamental requirement of a fair hearing required that the statements be excluded," saying: "They were not submitted in the absence of the witness but only after he had taken the stand, admitted that he had made them, said he had spoken the truth when he made them, and denied merely that he had been correctly reported" (R. 94). In all deference, the only accurate assertion in this extract is the first clause. O'Neil did not admit he made the statements; he strongly denied he made them (R. 3002-3). O'Neil did not say he had spoken the truth when he made them; he said that the statements he did make to the investigators were the truth, but that the proferred statements were not the statements he made to them and they were not the truth (R. 451). O'Neil's testimony that the statements made to the Government agents were the truth was given on the basis of the twice repeated explanations of Judge Sears that such testimony would not mean the statements that the Service claimed he made (R. 3080-1; 451). As the Board of Immigration Appeals said (R. 451): "O'Neil swore to 'Nay!' No process of reasoning can make it an oath to 'Yea'!" Finally, O'Neil did not deny "*merely* that he had been correctly reported," but as the Board of Appeals said: "O'Neil undeviatingly denied making to Government agents any of the material statements claimed by the Service" (R. 451).

Also, apart from the published Rules of the Department, the O'Neil statements are incompetent as affirmative evi-

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[24] *U. S. ex rel. Ohm* v. *Perkins*, 79 F. (2d) 533; *Colyer* v. *Skeffington*, 265 Fed. 17, 28-30, 46-8; *U. S. ex rel. Chin Fook Wah* v. *Dunton*, 288 Fed. 959, 960; *Sibray* v. *United States, ex rel. Plichta*, 282 Fed. 795, 797.

dence. Certainly, this would be so in judicial proceedings.[25] It is no less so in administrative proceedings[26] and, to the precise point, in deportation proceedings.[27]

O'Neil's denial on the stand that he had made the material parts of the statements prevented the alien from protecting himself by cross-examining as to the truth of the statements denied. As the Board of Appeals said (R. 452-3; 459-61):

> "* * * in the face of a completely favorable denial of the making of the statements, the Alien had no opportunity to cross-examine as to the truth of the statements denied. To receive the statements as affirmative evidence would deprive the Alien of cross-examination on highly material evidence at the very heart of the case.
>
> * * * * * *
>
> "Fundamentally, as an administrative agency, we are required in deciding the question of the admissibility as evidence of the O'Neil prior statements to weigh the factors of materiality, reliability, and protection of the Alien.

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[25] *Hickory* v. *United States*, 151 U. S. 303, 309; *United States* v. *Block*, 88 F. (2d) 618, cert. denied 301 U. S. 690; *Bernhardt, Adm'r.* v. *Chicago B. & Q. Railroad Company*, 132 Neb. 346, cert. denied 302 U. S. 685; *Young* v. *United States*, 97 F. (2d) 200, reh. denied 97 F. (2d) 1023; *New York Life Insurance Company* v. *Bacalis*, 94 F. (2d) 200; *Rosenthal* v. *United States*, 248 Fed. 684.

[26] *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88, 93; *Tri-State Broadcasting Co., Inc.* v. *Federal Communications Com'n*, 96 F. (2d) 564, 566.

[27] *Svarney* v. *United States*, 7 F. (2d) 515; *Ungar* v. *Seaman*, 4 F. (2d) 80; *Ex parte McMahon*, 1 F. (2d) 456; *Ex parte Tom Yuen*, 230 Fed. 951; *United States ex rel. Papa* v. *Day*, 45 F. (2d) 435; *Braden* v. *Zurbrick*, 38 F. (2d) 472; *Browne* v. *Zurbrick*, 45 F. (2d) 931, *Ex parte Radivoeff*, 278 Fed. 227.

> "The O'Neil prior statements were obviously highly material. They were equally unreliable. And there was no effective protection for the Alien. With the factors of high unreliability and lack of protection present, the materiality of the statements all the more requires their exclusion as evidence."

The authorities are uniform that deprivation of cross-examination in deportation cases constitutes reversible error, rendering the hearing unfair.[28]

On the issue of substantial basis for credibility of these statements, assuming them to be admissible, we rely upon the treatment of the point in the decision of the Board of Immigration Appeals (R. 462-8).[29]

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[28] See cases cited in fn. 27 *supra* and *Gonzales* v. *Zurbrick*, 45 Fed. (2d) 934. See also Rule § 150.6 (d) providing that counsel for the alien be permitted "to cross-examine witnesses called by the Government."

[29] The Board's finding against O'Neil's credibility is partly based on the inherent improbabilities (R. 462-5) and the internal inconsistencies (R. 466) of the very statement upon which Government reliance is placed. The inconsistencies include the following: (1) While the statement says that O'Neil saw a Communist Party membership book in Bridges' possession, that he saw the name in the book, and that it was "Bridges' right, his own name", elsewhere the statement says that it was not Bridges' name, but the name of Dorgan; and still elsewhere that O'Neil did not see the name in the book at all; (2) While in one part of the statement O'Neil says that he attended at least five Communist Party meetings with Bridges, that Bridges held top fraction Party meetings in his room, and that Bridges reminded O'Neil that he (O'Neil) was not attending Party meetings, elsewhere in the same statement O'Neil says: "Bridges never at any time attended any Communist Party meetings"; (3) While the statement says that Bridges discussed Bridges' membership in the Party with O'Neil, it also says that Bridges never stated to O'Neil that he (Bridges) was a member of the Party (R. 466).

3

The O'Neil incident involves more than the admission of incompetent evidence or of evidence taken in defiance of published Departmental Regulations. The error, in any event, went to the substance of a fair trial.

It is not difficult to see why this is so. Out of this entire record of some 7500 pages, this was the only item of evidence on which Judge Sears was content to rest a specific finding of membership. He said (R. 271):

> "* * *I conclude that it is established that the narrations contained in O'Neil's statement to Mrs. Segerstrom and in his conversation in the presence of Major Schofield are the truth, and I find the fact that *in accordance therewith* that Bridges was in 1937, a member of the Communist Party" (italics supplied).

The Attorney General chose a different form of expression, but only a slightly expanded content (since he bracketed Lundeberg with O'Neil), saying: "If this evidence is believed * * * the doubt is decided" (R. 90).

O'Neil, "the theatrical, sensation loving braggart," was the rock of the entire case. Can there be any question of the pervading quality of this error? Judge Healy below, in writing for the dissenting Judges, said (R. 7807):

> "The real inquiry is whether the practice was 'such as might have led to a denial of justice'. In this instance the remaining showing of party membership was of so flimsy a character as to lead the Appeals Board to reject it entirely. The Attorney General's acceptance of the O'Neil hearsay as probative evidence might easily have served to tip the scale. I am satisfied it did so."

Once credited, the O'Neil statement could not fail to excite repercussions far beyond its immediate purport, affecting the view of the trier of the facts upon the other evidence offered and in relation to Bridges' own testimony. Recall the nature of the statements. He, O'Neil, was "the only man" who "had actually seen Bridges pasting dues stamps in Bridges' membership book in the Communist Party." He, O'Neil, "was the only man who had visual evidence of the fact that Bridges was a Communist" (R. 437). If this is error it is not "mere error"; it is deadly poison to the high concept of fair hearing. "If it is true of juries it is not wholly untrue of judges that they too may be 'impregnated with the environing atmosphere' (Mr. Justice Holmes, in *Frank* v. *Mangum*, 237 U. S. 309, 349)". Mr. Justice Frankfurter, in *Bridges* v. *California*, 314 U. S. 252, 300.

4

Harry Lundeberg's is the remaining direct testimony on membership which survived here. Its net content is an alleged admission of membership made by Bridges to Lundeberg in 1935.

Lundeberg occupies a position in the American Federation of Labor somewhat comparable to that occupied by Bridges in the Congress of Industrial Organizations (R. 468). The two men disagreed as early as October, 1935 on fundamental union policy and their differences long ago deepened into bitter enmity (R. 259, 475). On the stand, as Judge Sears noted, Lundeberg "characterized Bridges' labor record with a damaging phrase, saying, 'It stinks'," and expressed the view that the trade union movement would be better off without him (R. 259).

Lundeberg testified that, following a casual invitation by Bridges "to come up to have dinner with him and a friend of his" (R. 7338; 7265), he did so sometime in

the summer of 1935; and that during that evening, he had a conversation with Bridges and the friend, who told Lundeberg his real name was Darcy, a Communist. The examination of Lundeberg by counsel for the Service was fairly presented in the opinion of the Board of Immigration Appeals (R. 470-2):

> "'Q. Will you relate all the conversation that you had in Bridges' home at that time with Darcy, yourself and Bridges?
>
> A. Well, I don't remember the details. We talked about various things on the waterfront, and unions, and so forth. Darcy asked lots of questions. It was a general conversation.'

After a few intervening questions on another point, counsel returned to the subject with a specific question as to whether Darcy asked Lundeberg 'to do anything.' This elicited the information that Darcy asked Lundeberg to join the Communist Party, and stated that the Party would aid him by giving him support (7007). A further specific question as to whether Darcy said 'anything about Bridges' being a member of the Communist Party in Bridges' presence' brought forth the response: 'He mentioned several people who was a member of the Communist Party' (7008). Counsel persisted. The record continues:

> 'Q. What did he [Darcy] say about Bridges?
>
> A. Well, he said he was a member of the Communist Party.
>
> Q. What did Bridges say?
>
> A. Well, he says, "You don't have to be afraid because nobody has to know you are a member of the Communist Party if you join."
>
> Q. Did Bridges join Sam Darcy in urging you to join the Communist Party?

A. No. Sam Darcy is the guy—Sam Darcy was the guy who wanted me to join the Party' (7008).

Lundeberg went on to state that Darcy promised him lots of publicity and to 'make a great labor leader out of' him. Lundeberg replied that he wasn't interested in joining the Party, that he had always belonged to a trade union, and couldn't see why he should belong to the Party (7008-9). After an admonition by the Presiding Inspector that the examination was leading and to be very careful, Mr. Del Guercio, Service Counsel, continued his direct examination (7009-10):

'By Mr. Del Guercio:

Q. Was anything else said by either Sam Darcy or by Harry Bridges at that time?

A. Well, I can't remember. There was a general conversation.

Q. Now, did you join the Communist Party?

A. I should say not.

Q. Can you recall at this time anything else that Bridges may have said in the presence of Darcy and yourself at that time?

Presiding Inspector: That he did say.

A. I can't remember the details. It was a general conversation.

By Mr. Del Guercio:

Q. Generally, in substance, what did Bridges say? We don't expect you, of course, to remember the exact words or the—

Presiding Inspector: Have you given the substance as far as you remember it?

The Witness: Well, the substance was, as I told you, that Darcy asked me to join the Communist Party and Bridges says, "You don't have to be afraid because I am one too," and the old stuff, and the

conversation was friendly all the way through, and I just laughed at it and forgot about it.' "

Bridges testified that Lundeberg was at his home for dinner once, but not Darcy (R. 7576-7); and denied any admission of membership or advice to Lundeberg to join the Party (R. 7709-10).

The meagerness of Lundeberg's contribution to the Department's case needs little pointing.[30]

(a) He gave three successive growing versions of the conversation—all on direct examination by counsel for the Service. The first version touches Bridges not at all. The second touches him slightly. Only in the third version, given in response to highly suggestive, leading questions on direct, and after admonition by the Presiding Inspector to examining counsel that the examination was leading and to be very careful (R. 7267), does Lundeberg say that Bridges said, "You don't have to be afraid because I am one too", adding "I just laughed at it and forgot about it".[31]

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[30] The Attorney General drew against Bridges an inference from his failure to call Mrs. Bridges and Norma Perry as witnesses (R. 91). But as the Board points out (R. 473-4 fn. 105), the Government's burden of proof may not thus be transferred to the alien. Moreover, since Mrs. Bridges and Norma Perry were not present at the conversation in which the alleged admission of membership was made, they cannot even be presumed to have had material testimony to offer (cf. *Mammoth Oil Co.* v. *United States*, 275 U. S. 13, 51-3, and other cases cited (R. 474 fn. 105). As to Norma Perry, the record also indicates her hostility to Bridges (R. 6447-8), and if any inference was appropriate, it was, as suggested by the Board, against the Government.

[31] This last sentence is highly significant. A comment of precisely similar purport made by witness Kelley (R. 317-18) led Judge Sears to conclude: "Inasmuch as it did not impress Kelley as serious at the time, I hold it too equivocal to base a finding of membership or affiliation thereon". Compare the similar effect of such statements upon weight of testimony in the decision of Dean Landis (R. 602). He said: "It is difficult to take seriously hearsay testimony that Detrich himself at the time it was given believed to be mere talk."

(b) Lundeberg gave the Government representatives, on three different occasions, statements in contradiction of his testimony. The first was in 1939, during the first hearing (R. 7344), when Lundeberg told Government prosecutor Shoemaker, who interviewed him as a potential witness, that he had no information to indicate that Bridges had ever been a Communist (R. 7344-5). The second was in the fall of 1940, when he made similar statements to the F. B. I. (R. 7340-1). In the spring of 1941, he again informed Government representatives, including Major Schofield, that he possessed no information to indicate Bridges had ever been a Communist (R. 7347, 7349). These prior statements were made under the most solemn circumstances, during the course of official investigations conducted by representatives of the Government.

(c) The Board of Immigration Appeals found: "On the record here, Lundeberg impresses neither in truthfulness nor in forthrightness" (R. 479); when giving testimony as to his role in an important labor controversy he was "impressive in evasiveness", "unresponsive and at times incredible, backing and filling of a witness who was not forthright" (R. 484).[32]

(d) Value must also be ascribed to improbabilities in Lundeberg's story. Lundeberg says without hesitation (R. 7293) that "absolutely" he has openly fought Communists ever since he became president of the Maritime Federation

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[32] For example, Lundeberg's vagueness concerning the time of the dinner at which Darcy was alleged to have been present (R. 7265, 7334, 7362-5, 7366, 7373). The dinner occurred some time between the end of June and September, 1935 (R. 473 fn; 5902, 5905, 5910; 6445-6; 7576). The date is important, because another Government witness gave uncontradicted testimony that Darcy attended a convention in Moscow from the last week in July until late in August (R. 2175-6). Lundeberg fixed the dinner as occurring in the summer of 1935 after Bridges left the hospital (R. 7265, 7366). He was still in the hospital as late as June 22, 1935 (R. 5902, 5905, 5910).

of the Pacific in April, 1935, which is at least two months before the date of the dinner at which he is supposed to have been invited to join the Communist Party. Considering the alleged policy of concealment pursued by communists in labor organizations, it would be strange indeed that a man openly hostile to the Party should so readily be provided with evidence that Bridges, over whom the threat of deportation proceedings hung, was a member. Indeed, at the time of the conversation, Lundeberg was perhaps the most powerful figure in maritime labor matters on the Pacific Coast. Yet he states that the inducement offered him to join the Party was that he would be "built up" and made "a great labor leader out of" (R. 7267).

What weight then in the scales appropriate for this case is to be ascribed to testimony by a bitter enemy, of an equivocal admission, in the circumstances here described, made six years previously and which at the time it was made the witness "just laughed at it and forgot about it"![33] Even the majority judges below noted the admission falls into a class of evidence that is easily given and hard to refute and fraught with "danger of mistake" (R. 7790). Its unsubstantiality as a matter of law is equally clear.[34]

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[33] Compare the weight given by this Court in *Baumgartner* v. *United States*, 322 U. S. 665, 677 to "the statement of one witness that Baumgartner had told him that he was a member of the Bund."

[34] In *Nagle* v. *Eizaguirre*, 41 F. (2d) 735 (C. C. A. 9), the order of deportation was based upon the uncorroborated testimony of a prostitute who held strong bias against the alien, and had testified falsely to material facts. The Court held that whether her testimony was entitled to any credence was a matter of law. Refusing to be bound by the findings of the Immigration Service, the Court voided the deportation order. See also *Consolidated Edison Co.* v. *N.L.R.B.*, 305 U. S. 197, 230.

As shown, Lundeberg concededly gave testimony fundamentally inconsistent with prior statements he had made to government officials. Since these inconsistencies were upon highly material matters, this fact alone justifies rejection of his testimony. (*Chin Ching* v. *Nagle*, 51 F. [2d] 64, 65 [C. C. A. 9]).

(*Continued on following page*)

Testimony of two other witnesses, Barlow and Kelley, was relied upon by the Government as being of "corroborating significance in relation to Lundeberg's testimony" (Government's Brief below, p. 96).

Barlow's (R. 271-2)—that Bridges remarked to him at the end of the session of the Maritime Federation convention in 1935, in a conversation occurring on the stairway of a hall in the presence of "quite a few" others (R. 7377), that the only way a young fellow could get along in the labor movement today was to join the Communist Party. Bridges denied having made such a remark. Barlow, an official of Lundeberg's union (R. 7390) when sought by agents of the Government as a witness at the 1939 hearing

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The existence of inherent improbabilities in Lundeberg's testimony also militates against acceptance of his word. "There may be such an inherent improbability in the statements of a witness as to induce the court or jury to disregard his evidence, even in the absence of any direct conflicting testimony. He may be contradicted by the facts he states as completely as by direct adverse testimony; and there may be so many omissions in his account * * * as to discredit his whole story." (*Quock Ting* v. *United States*, 140 U. S. 417, 420-1.)

Lundeberg's testimony of a claimed admission of Communist membership by Bridges is subject to the familiar rule that alleged oral admissions should be cautiously regarded. (*Idaho Etc. Co.* v. *Cahill*, 52 F. [2d] 70, 74 [C. C. A. 10].) The reason for this rule, as expressed by Justice Story, is that an alleged admission "is in all cases most unsatisfactory evidence, on account of the facility with which it may be fabricated, and the impossibility of contradicting it. Besides; the slightest mistake or failure of recollection may totally alter the effect of the declaration". (*Smith* v. *Burnham*, 22 Fed. Cas. 465, 466.)

Heflin v. *Heflin*, 216 Ala. 519, 113 S. 535;
Bradley v. *Clarke*, 219 Ky. 438, 293 S. W. 1082;
Jensen v. *Howell*, 75 Utah 64, 282 Pac. 1034;
Jones v. *Harris*, 122 Wash. 69, 210 Pac. 22;
Commercial Importing Co. v. *Wear*, 180 Wash. 669, 41 P. [2d] 777;
Papke v. *Haerle*, 189 Wis. 156, 207 N. W. 261;
Smith v. *Burnham*, *supra*;
Farque v. *Gulf State Utilities Co.* [La. App.], 140 S. 90.

against Bridges, said he had no information tending to show Bridges was a Communist (R. 7385-6). At the 1941 hearing, he testified that up to the moment of taking the witness stand, he had never related his 1935 conversation with Bridges to any representative of the Government (R. 7385-7, 7389, 7392-3). The Board of Immigration Appeals held the remark in question was not made (R. 427-8, fn. 76); Judge Sears held it was, but that it no more than "indicates a sympathetic attitude toward Communism" (R. 272). The Attorney General held only that it "tended to associate Bridges with the Communist Party" and "has some significance in the general picture" (R. 96).

Kelley's—a report of a conversation with Bridges and one Dietrich,[35] supposedly containing an implied jocular admission by Bridges of membership, was held by the Presiding Inspector as not having impressed the witness as "serious at the time" and therefore

> "too equivocal to base a finding of membership or affiliation thereon" (R. 318).

This testimony was not even mentioned in the decision of the Attorney General.

6

We turn to evidence on "affiliation" which, equally with membership, is forbidden by the statute. But here, more is needed than determination of whether the appropriate standard of proof has been satisfied. Also needed is agreement as to the meaning of the statutory words "affiliated with."

Certainly, affiliation means something less than membership (*Kessler* v. *Strecker*, 307 U. S. 22) and it doubt-

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[35] Detrich was a witness in the hearing before Dean Landis. His testimony was not credited (R. 601-2). See *supra*, note 31.

less covers that relationship with an organization which is equivalent to membership but which may fail to constitute membership for technical reasons. Probably, as Dean Landis said: ". . . this was the main purpose underlying the original introduction of the phrase into the statute" (R. 512).

While legislative history of the statute seems to shed no light on this (R. 512) judicial authority is helpful. Thus employment as managing editor of a paper published by the Communist Party, and being an instructor at an official Communist school and soliciting funds for the Party, was held to constitute affiliation (*Branch* v. *Cahill*, 88 F. (2d) 545). Selling the Daily Worker, a Communist paper, copies of which were received directly from the Communist Party, desire to become a member (although thwarted in this desire because considered not sufficiently intelligent to join), membership in the Unemployed Council, an organization indirectly associated with the Communist Party, and finally contributing money to the Communist Party, were held to establish affiliation (*Wolck* v. *Weedin*, 58 F. (2d) 928. An alien who pledged himself to perform certain tasks prescribed by the Party in order to secure reinstatement was held affiliated (*U. S. ex rel. Yokinen* v. *Commissioner*, 57 F. (2d) 707).

On the other hand, the phrase has been regarded as unfulfilled on evidence showing sympathy with a proscribed organization or even willingness to aid the organization in a casual and incidental way. The most satisfactory expression of the line drawn is that of Judge Chase in *U. S. ex rel. Kettunen* v. *Reimer*, 79 F. (2d) 315.[36] This case involved an alien, previously a distributor

[36] Counsel for the Service at the opening of the hearing argued that the doctrine of the *Kettunen* case was unsound: "There is nothing which indicates and supports the conclusion at which Judge Chase arrived" (R. 802).

of the Daily Worker, who attended a meeting of the Communist Party, executed an application for membership, paid the admission fee, but who later changed his mind about becoming a member and asked that his application be not formally submitted. Judge Chase held the facts were insufficient to constitute an affiliation, saying (at page 317):

> "In deciding this case, we shall not attempt to give a comprehensive definition of the word 'affiliation' as used in the statute. Very likely that is as impossible as it is now unnecessary. It is enough for present purposes to hold that it is not proved unless the alien is shown to have so conducted himself that he has brought about a status of mutual recognition that he may be relied on to cooperate with the Communist Party on a fairly permanent basis. He must be more than merely in sympathy with its aims or even willing to aid it in a casual, intermittent way. Affiliation includes an element of dependability upon which the organization can rely which, though not equivalent to membership duty, does rest upon a course of conduct that could not be abruptly ended without giving at least reasonable cause for the charge of a breach of good faith. So tested we cannot agree that there was evidence to establish that this relator was affiliated with the Communist Party."

In an unreported decision, *U. S. ex rel Tolsky* v. *Wilson* (S. D. N. Y., 1920), a similar opinion was expressed by Judge Learned Hand (R. 381):

> "However this may be, it seems to me pretty clear that it [affiliation] involves a mutual recognition of permanent cooperation between the organization and the person affiliated and not a spasmodic or casual assistance. Mere sympathy with the aims of the so-

ciety, even accompanied by efforts to further its aims, does not fall within that word."

Dean Landis offered this statement of his own views after study of these authorities (R. 513):

> "The language of Judge Chase seems appropriate. 'Affiliation' is plainly a word that speaks in terms of a stronger bond than 'association.' In the corporate field its use embraces not the casual affinity of an occasional similarity of objective, but ties and connections that, though less than that complete control which parent possesses over subsidiary, are nevertheless sufficient to create a continuing relationship that embraces both units within the concept of a system. In the field of eleemosynary and political organization the same basic idea prevails. Thus thinking in terms of affiliation as distinguished from membership must have regard to a bond of this general nature existing, explicitly or implicitly, between the alien and the proscribed organization."

Judge Sears, however, did not seem to have been guided by any principle, but proceeded simply on the vague premise that the trier of the facts must somehow determine where the weight of the evidence lies (R. 349-51; 326-38). The Attorney General did not specifically discuss his understanding of the meaning of affiliation at all; and, as Judge Healy said below, "he appears to have relied indiscriminately on every circumstance which might be thought to spell sympathy or to be indicative of an association however temporary or in pursuit of ends however legitimate. His finding on this issue is without substantial evidentiary support" (R. 7803). Judge Healy added (R. 7801):

> "In condemning 'affiliation' with a proscribed group it would seem that Congress had in mind a working

arrangement of some sort designed, or at least having a substantial tendency, to further the subversive aims of the group. A temporary or occasional joinder of forces for the attainment of an end entirely legitimate in itself, as for example, the betterment of substandard conditions of workers in a given industry, can hardly be thought to fall within the legislative ban."

This then, we submit, is the frame of reference on affiliation: Does it show a status of mutual recognition between the Party and Bridges that Bridges could be relied upon to cooperate with the Party for its purposes on a fairly permanent basis? Does it show a relationship of continuing dependability upon which the Party was fairly entitled to rely? And, of course, the evidence needed to answer these questions affirmatively must be no less than "substantial evidence" (*supra*, pp. 31-2).

7

The central evidence on affiliation relates to affiliation with the Marine Workers Industrial Union (MWIU) and, by that cord, affiliation with the Communist Party. The MWIU was held, it will be recalled, by the Immigration and Naturalization Service on January 3, 1934, to be not a proscribed organization (*supra*, p. 18), was liquidated in 1935 (R. 205). Consequently, virtually all this evidence relates to the years preceding that date. That the Communist Party is not a proscribed organization within the statute, we argue later (*infra*, pp. 92-7).

The time span on this evidence, 1933-35, suggests rightly that it all springs from the 1934 maritime strike, its preparation, conduct and consequences.

The most crucial evidence, to the mind of Judge Sears and of the Attorney General, was that relating to Bridges' connection with the mimeographed paper, the

Waterfront Worker (*supra*, p. 15). This paper was avowedly published from December, 1932, to August, 1933, under the auspices or with the assistance of the MWIU, and avowedly published from September, 1933, to its demise in 1936 by an independent group of longshoremen, including Harry Bridges, without any apparent assistance from the MWIU. Judge Sears and the Attorney General concluded, contrary to the flat denial by Bridges (R. 3234), that Bridges was associated with the paper during the period of its avowed sponsorship by the MWIU and, further, that during the subsequent period of avowed sponsorship by Bridges and his group of independent longshoremen, the paper in reality continued an instrument of the MWIU and the Communist Party. There is no testimony in the entire record to support this conclusion. All that is relied upon is the supposed internal inconsistency in Bridges' testimony and supposed internal inconsistencies between his testimony and the paper itself.

Apparently everything turned on whether Bridges and his group took the paper over in December 1932 or, as Bridges testified at the hearing, on September 15, 1933, because four or five of the issues preceding September 15, 1933 acknowledged the assistance of the MWIU, while the September 15, 1933 issue and subsequent ones did not (R. 242). Was Bridges an editor of the paper during the period from December 1932 to August 1933 when it acknowledged assistance of the MWIU—was therefore the crucial question. Bridges said, no, and there is no witness for the Service to contradict him. However, Judge Sears and the Attorney General said, yes. The explanation of how they came to this conclusion is very important.

In the 1939 hearing Bridges had testified as follows (R. 239-40):

> "There was really no start toward real organization until September 1932, when we started our

waterfront paper. The waterfront paper generally dealt with the ills of the longshoremen. In other words, these various straw bosses or gang foremen along the waterfront, who we used to call slave drivers, they were written up in the paper in their various habits. The paper immediately found wide interest among the longshoremen.

Then, of course, we had no set plan. All we used to say in the paper was 'to organize.'

* * * *

Q. Do you know how long the Waterfront Worker had been running at the time when you first took it over?

A. Not very long. It is pretty hard to remember. If I recall, we took it over around September or October 1932, or it was running then and we took it over later. I can't set the exact date. I would have to get the original issues and check it up.

Q. I think you said, Mr. Bridges, in your prior testimony, about September 1932. Something like that. But the point I want to know is about how long it had been running prior to that time.

A. I can't remember. Maybe a month or two. My first recollection of ever seeing it was September of 1932."

This 1939 testimony was read into the 1941 hearing. In his 1941 testimony, however, Bridges said that the September or October 1932 date he had given in the previous hearing was a mistake (R. 6133), and that the date he and his group took the paper over was September or October 1933 (R. 6133). Judge Sears disbelieved the 1941 testimony, but from the 1939 testimony above quoted he selected some phrases, obviously giving them a more precise quality than did the witness, rejected others, and *added* an assumption wholly unwarranted by the record,—coming out with the conclusion that Bridges became an editor in December

1932. Thus, from Bridges' testifying with uncertainty in 1939—"It is pretty hard to remember. If I recall, we took it over later in September or October 1932, or it was running then and we took it over", Judge Sears concluded—with certainty—it had been running in September or October 1932 and taken over by Bridges in December 1932 (R. 241). Bridges' 1939 testimony in answer to an immediately succeeding question to the effect that his group had taken the paper over in September 1932 and it had been running "maybe a month or two prior to that time", Judge Sears rejected. And his amplification —without a shadow of warrant in the record—brought in to make his version fit with Bridges' consistent testimony that the paper had run sometime before he and his group took it over—was that the Waterfront Worker was in existence *before* December 1932. The December 1932 issue was Vol. 1, No. 1 of the Waterfront Worker and was the first issue that appears in the record to have been published by anyone under anyone's sponsorship. Hence, if Bridges' testimony be credited, as Judge Sears did credit it, that there was a lapse in publication before he and his group took the paper over, Bridges, on this record, simply could not be tied to Vol. 1, No. 1 (Dec., 1932).

Judge Sears' (and the Attorney General's) conclusion further is flatly opposed by every item in the record and Bridges' testimony is completely supported. The record is unchallenged that Bridges began to participate in the editorship in connection with his activities in the Longshoremen's Union (R. 388), an organization which did not exist on the coast in 1932 and which he did not join until June 1933 (R. 388). Bridges tied the date of his group's taking over the paper to the Matson strike which occurred in October 1933, and in the September 15 issue that proposed strike is the subject of much of the material (R. 6181-94). The hiatus in publication dates referred to by Bridges did occur just prior to September

1933 .(R. 388-9). The significant change in the masthead of the paper—edited by a rank and file group of the I. L. A. without reference to the MWIU—occurred on September 15, 1933 (R. 6181). There was a sharp drop in the size of the paper on September 15, 1933, to four pages (R. 390) (corresponding, incidentally, to Bridges' statement given earlier in his testimony [R. 760]).

Little wonder that the Board of Immigration Appeals concluded (R. 402):

> "We accordingly conclude that Bridges became connected with the 'Waterfront Worker' on or slightly before September 15, 1933, after the former staff had abandoned the enterprise.
>
> There is then, in our view, no connection between the Alien and the prior publication, admittedly sponsored by the M.W.I.U. And there is no deliberate untruth to impugn other sections of his testimony."

But Judge Sears and the Attorney General concluded that the Waterfront Worker, even after September 1933, remained an instrument of the MWIU. Keeping in mind any fair definition of affiliation, this conclusion is wholly without record support. We need but enumerate the items relied on.

(a) There was similarity in substance in the issues before and after the crucial date (R. 243); but as the Board of Appeals said: "Of such similarities in substance as appear it may be said that they relate almost exclusively to the grievances of the waterfront. And insofar as they do so they have but little relevance" (R. 403).

(b) There was continued "favorable treatment" of the MWIU, TUUL and other Communist sponsored organizations (R. 86) and "extremely cooperative attitude with regard to the MWIU" (R. 243). Again the Board's opposite conclusion is demonstrably plain on the cold record—"They con-

tain no reference to the T.U.U.L. There are fewer and less favorable references to the M.W.I.U. in the period prior to and during the 1934 strike than might have been expected in view of the assistance that organization rendered the I.L.A. in supporting the I.L.A. strike position. After the end of the strike, but one reference to the M.W.I.U. appears, and that is in a letter to the editors" (R. 404-5).

(c) Favorable treatment was accorded "other Communist sponsored organizations" (R. 245, 405). Still less appears to support this, rightly said the Board with conclusive demonstration from the cold Record (R. 405, fn. 43).

(d) "Consistent attacks upon the so-called 'reactionary' leaders of the A. F. of L." (R. 245). This we pass.

(e) "Support of the Communist candidates for political office" (R. 245). On this, the papers in evidence show only one single instance, and there, as the Board said, "the support given • • • was based solely upon the platform on which they ran. No element of that platform had any apparent relation to forbidden doctrine" (R. 407).

(f) The Waterfront Worker advised the reading of Communist literature (R. 245). The three instances of such advice were the Western Worker, the Daily Worker, and a pamphlet of the 1934 strike written by William F. Dunn, supposedly a Communist official. As to these, the Board said (R. 410-11):

> "We find in these three instances no warrant for concluding that the 'Waterfront Worker' advocated the reading of Communist literature generally, or for any purpose other than that stated in its own columns and in the Alien's testimony at both hearings. That purpose, to call attention to publications treating accurately labor matters of

peculiar concern to longshoremen, we cannot hold to be one which shows that the editors who entertained it maintained the forbidden degree, or any degree, of relationship to the Communist Party."

(g) The paper used as mailing addresses (not offices, since it had none) a hall and a post office box, each of which was rented by a Communist. On this point we refer to the treatment by the Board of Immigration Appeals (R. 411-18).[37]

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[37] That even on examination of the thirteen issues (out of no less than eighty published) selected by the Service for the specific purpose of attempting to demonstrate forbidden affiliation there are "specific indicia that point the other way" is shown decisively in the following summary of the Board of Immigration Appeals (R. 418-20):

"The explicit denial of M.W.I.U. sponsorship has been mentioned and it is thought to be not wholly without weight here (see 5391-2). So also the rapid abandonment of foreign news items and discussions of broader theoretical matters in favor of concentration on local and coastwise matters directly affecting the San Francisco union longshoremen is significant. Finally, the paper taken as a whole conveys an impression quite the opposite of that reflected by analysis of the minutiae upon which the Service's case was founded and which were made the basis of the proposed findings. From September 15, 1933, on, it was unquestionably an informal organ only of the I.L.A., which voted confidence in it (6152). Enumeration of the items selected for unfavorable emphasis draws attention from the overwhelming predominance of concern exhibited in the paper's columns for matters of interest only to members of that organization. Infrequent and casual mention of the M.W.I.U., the I.S.U., and other organizations, suspect or otherwise, constitutes an infinitesimal portion of the subject matter treated. And we cannot conclude that it shows on the part of the editors a purpose to subvert their readers through the medium of a trade union paper which was such in seeming only.

"That the paper displayed a militant attitude cannot be questioned, but that its militancy went beyond anything consistent with a legitimate, if embittered, labor viewpoint on the controversies involved in a sharp labor struggle does not appear from the issues in the record. Strident name calling appears in plenty. Incitement of tempers already overheated may have passed the bounds of judgment or taste. But adherence to a broader and deeper philosophy of revolt by violence is not shown."

8

The finding of affiliation rests in some part also on other minor items of evidence. We enumerate all of them elsewhere (*supra*, p. 16 and *infra*, p. 98) and we regard the enumeration as adequate support for our position,—that they fall far short of meeting the test of affiliation.

9

This is the case against Bridges on membership and affiliation. The order rests, as the Government conceded below, "basically upon membership" (Govt's Brief, p. 23). And the finding of membership rests basically upon evidence taken in avowed defiance of published Departmental Regulations and in defiance, not avowed, of every traditional safeguard for testing truth. The finding of "affiliation" rests upon a fundamental misconception of the term. Of this record, we submit, this Court must say, as did Judge Healy below (R. 7798):

> "It is notable that the alien, in one fashion or another, had been under almost continuous investigation for a period of more than five years. Prior to and during the course of the second trial the Service had enlisted the powerful cooperation of the Federal Bureau of Investigation. The country had been scoured for witnesses, every circumstance of Bridges' active life had been subjected to scrutiny, and presumably no stone left unturned which might conceal evidence of the truth of the charges which the alien so flatly denied. The most significant feature of the inquiry, as it seems to me, is the paucity of the evidentiary product as contrasted with the magnitude of the effort expended in producing it."

This is not substantial evidence; this is not evidence which can induce conviction; this is not evidence to sup-

port a determination with consequences so grave as here; and, upon it, deportation may not rest without gross offense to the Fifth Amendment.

II

DEPORTATION UPON THESE PROCEDURES OFFENDS DUE PROCESS.

We begin by reminding that action to deport is subject to judicial review to determine whether the procedures "offend the fundamental principles of justice embraced within the conception of due process of law". See cases cited *supra*, p. 30.

The appropriate object of inquiry here is not alone whether this or that particular point in the procedural history of this case is *the* constitutional vice. Rather, we submit, it is on portrayal of this history in whole purport, whether the final chronicle that emerges is one of vitiating unfairness, whether the atmosphere, in entire, demonstrates the unfairness of its parts. (See *Colyer* v. *Skeffington*, 265 Fed. 17, *Gellhorn*, Cases on Administrative Law, 1940, pp. 525-6). It is, in sum, whether the Attorney General has accredited himself "by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play" *Morgan* v. *United States*, 304 U. S. 1, 22.

The argument here is deeper than that Bridges has been denied due process—

—because he has been subjected to successive hearings on essentially the same evidence in the face of a prior considered determination of his innocence, or

—because he is being subjected to *ex post facto* and retrospective operation of a statute, or

—because the attempt to deport him on a ground which the Government since January 1934 has avowed to be

no ground for deportation is discriminatory to the point of arbitrariness, or

—because the Department has violated its own rules in acceptance of the most prejudicial and flagrantly improper piece of evidence in the entire case, or

—because the Attorney General gave weight to evidence which he agreed was "inconclusive, unreliable and contradictory" on the theory that "taken as a whole it cannot because of its volume be completely disregarded", or

—because the Attorney General reversed a decision favorable to Bridges rendered by the normally *deciding* body, the Board of Immigration Appeals, without giving Bridges notice or opportunity to reach his mind.

The basic argument is that—whatever may be said in a constitutional sense of each of these elements, singly,—a procedure which exhibits all of them cannot survive this Court's inquiry.

1.

We have referred to the early departmental investigations of Bridges in which he was absolved of all charges and to the formal hearing before Dean Landis in which all charges were found baseless, resulting in the cancellation of the warrant of arrest (*supra*, p. 6 *et seq.*). At the time of the Landis hearings, and because of the decision of this Court in *Kessler* v. *Strecker*, 307 U. S. 22, the deportation statute required a finding that the petitioner was a member or affiliate of a proscribed organization at the time of the issuance of the warrant. Within six months following final disposition of the first warrant, and on June 28, 1940, Congress adopted the amendment of the law under which the present warrant was issued. Its purpose, both to nullify the ruling in *Kessler* v. *Strecker*, *supra*, and to

furnish a ground for further action against Bridges was obvious (*supra*, pp. 10-11). It provides in effect for deportation by reason of *past* membership in or *past* affiliation with a proscribed organization.

The ground thus furnished was availed of; and Bridges, exonerated by Dean Landis, has here been subjected to a second trial before Judge Sears.

The Government has suggested a formal distinction between the two proceedings—that before Dean Landis the issue was Bridges' membership or affiliation as of the issuance of the warrant, while before Judge Sears the issue was his membership or affiliation at any time following his admission to this country. The distinction will not survive examination.

No evidence was offered before Dean Landis as to present membership. All the proof was addressed only to past membership and affiliation, and the Government relied specifically upon a legal presumption of continuance to support its claim with respect to the time of Bridges' arrest in 1938.[38] As Dean Landis' opinion shows, his finding denying present membership or affiliation depends entirely upon his rejection of the Government's evidence of *past* membership and affiliation during the entire period 1932-1938,—precisely the period deemed relevant in the second proceeding (See table, p. 68a, *infra*).

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[38] The Government's own statement of its case before Dean Landis demonstrates the identity of the two proceedings.

"It is the Government position that it has shown that prior to the arrest of Harry Bridges he was a member of the Communist Party and has continued as such. It contends, and submits it has been proved, that, the alien having been shown to be a member of the Communist Party, the obligation rested upon him to show that he had ceased to be such member, and in the absence of such showing there is a legal presumption he remained a member, and therefore is subject to deportation under the Act of 1918 as amended" (Government's Brief to Dean Landis, p. 100).

The proof itself, in each of the proceedings, followed identical lines. In each proceeding, the Government attempted, unsuccessfully, to prove that Bridges attended Communist Party membership meetings; the witnesses were different persons, but the purport of their testimony the same. Similarly, proof was offered, in each case, of alleged admissions by Bridges of membership in the Communist Party; again, only the witnesses differed. Even more, the same miscellany of items offered as proof of affiliation with the Communist Party was all presented to and passed upon by Dean Landis (R. 604-7, 626-8). The Government saw fit to present a greater volume of testimony before Judge Sears than before Dean Landis, with respect to the further charge of Bridges' affiliation with the MWIU—principally concerning the "Waterfront Worker". But again all the subjects considered were mooted before Dean Landis; in fact most of the testimony in the first proceeding dealing with the MWIU was read into the record of the second proceeding (R. 75, fn. 6, 624-8, 635, 3231 ff.). The Board of Immigration Appeals stated its opinion that "the same factual issues" were tried in both proceedings (432, fn. 77), adding, "there is a serious question whether an administrative agency should relitigate time after time the same factual issues in the same type of proceeding" (*ibid.*). We annex in the adjoining pages a tabular statement showing how the same lines of testimony were given by the different witnesses in the two proceedings—the testimony covering the years 1934-1938.

The precise question here is not whether Dean Landis' findings and rulings were either correct or res adjudicata; it is whether, consistent with defensible standards of fairness, Bridges could be subjected to successive proceedings with respect to these identical matters.

The first hearing was no mere perfunctory proceeding, with only tentative conclusions. It was an extended and far-flung investigation in which the parties were repres-

Tabular Comparison of the Charges and Evidence at the Two Hearings.

First Hearing

harges: "After he entered the United States he became and now is a member of or affiliated with an organization, association, society or group that believes in, advises, advocates and teaches the overthrow by force and violence of the government of the United States" (named as the Communist Party in Government's Bill of Particulars).

Name of Gov't Witness	Type of Testimony Given [1]	Years to Which Testimony Relates	Cities to Which Testimony Relates [2]
ilner	a, c, d, e	1935-6	Se, Po
eech	a	1936	SF
apiro	d, e	1936-7	SF, LA, NY
umphreys	a	1935-Aug. 1938	SF, LA
eppold	f	1935-7	SF
ark	e	1935	Se
llen	a	1937	SF
oward	b, e, f	1936-7	SP, Se
etrich	b, c, d, e, f	1933-6	SF
ngstrom	a	1936-7	SP, Se
avis	a, d	1935-6	SF, Se
astor	a	1936	Se
rs. Castor	a	1936	Se
rs. Davis	a	1934	Se
areus	a	1934	SF
essler	a	1934	SF
ickleson	a	1934	SF
anazzi	a	1934	SF
enaat	e	1934	SF
ridges [4]	c	Dec. 1932-1938	——
OTAL, 20	a, b, c, d, e, f	Dec. 1932 to Aug. 1938	SF, Se, Po, LA, NY, SP

Second Hearing

Charges: "After entering the United States he has been a member of or affiliated with an organization, association, society or group that believes in, advises, advocates or teaches the overthrow by force or violence of the government of the United States" (named as the Communist Party in Government's Opening Statement).[3]

Name of Gov't Witness	Type of Testimony Given [1]	Years to Which Testimony Relates	Cities to Which Testimony Relates [2]
Lundeberg	b	1935	SF
O'Neil	b, d	1937	SF
Barlow	d	1935	Se
Lovelace (Mr. and Mrs.)	c, f	1935	Po
McCuistion	c	1936	NY
Innis	c	1936	SF
Rushmore	d	1935	NY
Chase	d, e, f	1937	LA
Diner	a	1934	Fr
Honig	a	1936-7	SF
Lawrence	a	1934	LA
Ryan	e	1934	LA
Cannalonga	a	1936-7	SF, Se
St. Clair	a, e	1935-6	SF
Wilmot	a, b, c	Apr. 1938	Po
Thompson	a	1934-5	NY
Kelley	d	1937	Se
Bridges [4]	c	Dec. 1932-1938	——
TOTAL, 19 [5]	a, b, c, d, e, f	Dec. 1932 to Apr. 1938 [6]	SF, Se, Po, LA, NY, Fr

[1] Abbreviations used in this column are as follows: a—alleged attendance of Bridges at Communist meetings; b—alleged admission by Bridges of Communist membership; c—associations of Bridges with Communists; d—alleged Communistic remarks by Bridges; e—hearsay statements concerning Bridges; f—opinion evidence of witness.

[2] Abbreviations used in this column are as follows: Se—Seattle; Po—Portland; SF—San Francisco; LA—Los Angeles; NY—New York; Fr—Fresno; SP—San Pedro.

[3] Additional charges lodged against Bridges at the second hearing, based on his brief membership in 1921 in the Industrial Workers of the World are now immaterial, inasmuch as the Attorney General found that such membership did not render Bridges deportable. (R. 100) The charge of deportability for affiliation with the MWIU, while new, is largely a by-product of the Communist charge.

[4] In addition to calling Bridges as its witness at both hearings, the Government at the second hearing introduced in evidence excerpts from his testimony at the 1939 hearing. This testimony deals with Bridges' association with the MWIU during the 1934 strike, the aid offered to his union by the Int'l Labor Defense, the aid given by the Communists in the 1934 strike, his associations with Communists, and his policy of non-discrimination in labor unions by reason of political beliefs. See R. 431-2, n. 77.

[5] At least five of these witnesses had been interviewed by the Government as potential witnesses for the 1939 hearing (Chase, R. 1330-2, 1356-9; St. Clair, R. 2480-7; Cannalonga, R. 7171, 7255; Lundeberg, R. 7344; Barlow, R. 7385). A sixth witness, Kelley, testified to hearsay statements made to him by Detrich, who was a Government witness in the 1939 hearing.

[6] One item of evidence introduded by the Government, involving a strike at the North American Aviation Company, related to the year 1941. It is immaterial at this time since the Attorney General found that this evidence did not show either membership in or affiliation with the Communist Party, but only a "sympathetic attitude toward a strike denounced as a Communist maneuver." (R. 99)

ented by counsel; witnesses were subpoenaed, examined, and cross-examined; arguments heard and briefs submitted. The suggestion of the Government below (Government brief, p. 33), that the proceeding before Dean Landis was in the nature of an inconclusive investigation like that before a committing magistrate, is hardly appropriate. Nor is it relevant to urge, as the Government also urged below (*idem.*, pp. 30-1), that here were administrative proceedings in which the principles of res adjudicata are often said not to apply. Even if they did not—and we submit on the contrary that they have vital relevance,—it is an intolerable proposition that there are no legal restraints upon governmental determination to try the same issues of fact in deportation, again and again, upon the same thin evidence, until success is achieved. Otherwise, the governmental force must ultimately prevail—regardless of merit.

Again, deportation proceedings are not merely civil proceedings to which the double jeopardy provision is generally considered not to attach; as we have shown (*supra*, p. 26) their consequences run far beyond those flowing from ordinary civil litigation. Deportation "may result also in loss of both property and life; or of all that makes life worth living" (*Ng Fung Ho* v. *White*, 259 U. S. 276, 284, per Brandeis, J.). Again, the easy formula—"This is not a criminal case"—is "too subtle when the problem is one of safeguarding the humane interests for the protection of which the double jeopardy clause was written into the Fifth Amendment." Frankfurter, J., *U. S. ex. rel. Marcus* v. *Hess*, 317 U. S. 537, 554. Regardless of the form of the proceedings, a *penalty* is here sought to be imposed. "Punitive ends may be pursued in civil proceedings." Frankfurter, J., *U. S. ex rel. Marcus* v. *Hess*, *supra*. Thus it is that double jeopardy is here imposed within the meaning of the Constitution (*United States* v. *Chouteau*, 102 U. S. 603, cf. *Huntington* v. *Attrill*, 146 U. S. 657; cf. *U. S. ex rel. Marcus* v. *Hess*, 317 U. S. 537).

The concepts of double jeopardy and res judicata which in other situations would concededly bar successive proceedings are, we submit, not only specific constitutional protections within their own spheres, however defined, but are inseparable from any concept of fundamental fairness. Double jeopardy in particular is "part of the protection of the Constitution against pressures and penalties that offend civilized notions of justice." Frankfurter, J., *U. S. ex rel. Marcus* v. *Hess*, 317 U. S. 537, 555. The Constitution guards against attempts "to wear the accused out by a multitude of cases with accumulated trials" (*ibid.*).[39]

* * * * *

The proceedings similarly offend common conceptions of fairness embodied in the *ex post facto*[40] (Art. I, sec. 9[3]),

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[39] Even on the Government's theory that it may proceed to a second hearing on the same general charge and the same type of evidence, the least that fairness requires is that the first adjudication be not wholly disregarded. For the administrator to fail, as here, to give appropriate weight to the authority of the prior exoneration partakes of such arbitrariness as to render the second hearing unfair (cf. *Ng Fung Ho* v. *White*, 259 U. S. 276, 283, 284). The lower courts have expressed this principle in terms of a duty to accord *prima facie* weight to the prior determination on pain of violating the Fifth Amendment (*Yuen Boo Ming* v. *United States*, 103 F. [2d] 355 [C. C. A. 9]; *Wong Chow Gin* v. *Cahill*, 79 F. [2d] 854, 857 [C. C. A. 9]; *Wong Yee Toon* v. *Stump*, 233 F. 194, 196 [C. C. A. 4]; *Leung Jun* v. *United States*, 171 F. 413 [C. C. A. 2]).

[40] It was ruled below that the *ex post facto* clause applies only to strictly criminal cases. The leading authorities however forbid any deprivation of fundamental rights which is based upon conduct antedating the penalizing statute. *Ex parte Garland*, 4 Wall. 333; *Cummings* v. *Missouri*, 4 Wall. 277; *Pierce* v. *Carskadon*, 16 Wall. 234; Cooley, "Constitutional Limitations" (7th ed. 1903) 375-376; Black, "Handbook of American Constitutional Law" (1927) § 266; Blackstone Commentaries [3d ed.] 11n.; McAllister, "Ex. Post Facto Laws in the Supreme Court of the United States" (1927) 15 Cal. Law Rev. 269, 281-282.

Mahler v. *Eby*, 264 U. S. 32, is relied on as establishing that statutes may apply retrospectively in deportation proceedings. The statute there did not however apply retrospectively, for the decision

(*Continued on following page*)

and due process clauses since the statute was amended on June 28, 1940 with the specific purpose in mind of deporting Bridges upon grounds admittedly not then existing.

Only upon the frank admission that it proposed to try Bridges on the same charge again, could the Government have renewed proceedings against him, after Dean Landis' decision. The amendment furnished a pretext for avoiding such an admission. Its effect, however, is not merely *ex post facto* but also retrospective—a distinction the importance of which has been indicated by this Court. (e. g., *Bugajewitz* v. *Adams*, 228 U. S. 585). It subjects aliens to deportation for membership in an organization, even though such membership had long since terminated when the amendment was adopted.

It is not necessary to argue here that the *ex post facto* clause applies in full vigor to the case of *any* alien affected by its retrospective operation. It is with respect to the particular circumstances of this case, to which the whole of this brief points, that the retrospective application of the statute to Bridges is unfair. The purpose of the draftsman of the amendment, directed at Bridges, could not be carried out except by reaching back into the past and penalizing a status which, the prior proceedings had established, did not then exist.[41]

* * * * * *

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was that a finding of present undesirability was prerequisite to deportation. The language relied on is therefore *dictum*, which fails moreover to recognize that the consequences of deportation are too serious to permit classifying it as merely a civil judgment—a fact more clear under present day conditions.

[41] As construed below; the amendment of the statute in 1940 deprived Bridges of the immunity from deportation proceedings under the law as it then stood (*Kessler* v. *Strecker*, 307 U. S. 22) and under the facts as ascertained in the 1939 hearing. Statutory constructions with similar effect have been condemned as *ex post facto* in criminal cases (*Lindsey* v. *Washington*, 301 U. S. 397), as when they constitute a new rule of evidence in aid of conviction (*Kring* v. *Missouri*, 107 U. S. 221); and a violation of due process in civil cases, as when they seek to free a cause of action from the bar of a statute of limitations which has run (*Stewart* v. *Keyes*, 295 U. S. 403).

If we leave the essential character of this second proceeding, as such, against Bridges and examine its conduct, the impression of vitiating unfairness is only deepened.

The charge of affiliation with the MWIU represents a reversal of the Government's settled attitude towards that organization—a reversal made only for Bridges.

Membership in or affiliation with the MWIU has not been deemed cause for deportation since the ruling of the Department of Labor in January 1934 (*supra*, p. 18). The warrant was simply in the language of the statute (R. 772-3). It was not until the opening day of trial that the Government disclosed that it was relying upon affiliation with the MWIU (R. 808).[42] In the prior hearing, doubtless because of the Department's 1934 ruling, no such charge was made. Since 1934, no other alien was faced with such a charge—notwithstanding that, before the decision in *Kessler* v. *Strecker*, in 1939, it was believed that either past or present membership constituted cause for deportation; and since the 1941 hearing (as shown before the district court—R. 733-4, 758-9) no other alien has been charged with past membership in or affiliation with the MWIU. Only Bridges has been held deportable for *past* affiliation with an organization which for substantially all the time of his supposed

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[42] "Once again we think that the existing practice is to be condemned. That practice is, in the overwhelming number of cases, to state the charges only in the language of the statute without further particularization. Frequently such charges, as in the case of membership in an organization advocating the overthrow by force or violence of the government of the United States, without mentioning what organization, are not only blind but unnecessarily so. A uniform practice of this character conveys the impression of a wilful—although no doubt actually it is an unthinking—policy of enhancing every possibility of surprise. The very lack of any pretense of legitimate reason for it renders it arbitrary. We recommend that consistent pains be taken to formulate charges with all the exactitude possible, and in greater detail than mere parroting of the general language of the statute." The Secretary of Labor's Committee on Administrative Procedure, p. 85.

affiliation with it had been authoritatively determined not to be included in the ban of the statute.

No legal arguments, however nice, can obscure the fact, which counsel for Bridges offered to prove (*supra*, p. 18) that there are today thousands of aliens in the United States who have been members of or affiliated with the MWIU, and other TUUL affiliates, against whom no proceedings have ever been brought. The statute has here been intentionally applied in a discriminatory manner.

Whether or not the specific guarantee of equal protection is part of the due process guaranteed by the Fifth Amendment, it is certain that a discriminatory application of legislation "may be so arbitrary and injurious in character as to violate the due process clause of the Fifth Amendment". *Detroit Bank* v. *United States*, 317 U. S. 329, 338. And the denial of the guarantee is properly supported on the showing, as here, that Bridges "has been singled out for invidious treatment". See *Hysler* v. *Florida*, 315 U. S. 411, 422. "* * * if there is an existing rule which protects certain rights, it violates every sense of decency which is the very heart of due process, to repeal that protection just for the purpose of the ends of the case which comes before the administrative authority." *Colyer* v. *Skeffington*, 265 Fed. 17, 48, quoting from the argument made by Mr. (now Mr. Justice) Frankfurter.

* * * * *

A like discrimination by virtue of effective repeal of a fundamental rule of evidentiary procedure designed as broad protection for the rights of all aliens, to support a result in this particular case is embodied in the O'Neil incident discussed in an earlier part of this brief (*supra*, pp. 35-46). In the acceptance of the O'Neil statement traditional safeguards for testing truth and published rules of the Department were flagrantly disregarded. Judge Bourquin reminded twenty years ago that the Department's rules "constitute for aliens in deportation proceedings due process of law guaranteed by the Federal Constitution to

all men". *Ex parte Radivoeff*, 278 Fed. 227, 229; See *Bilokumsky* v. *Tod*, 263 U. S. 149, 155; *United States ex rel. Ohm* v. *Perkins*, 79 Fed. (2d) 533.

* * * * *

Consideration of the Attorney General's novel notion of weight to be given to testimony flatly rejected by the presiding Inspector adds more dark shadow to this recital. Seven witnesses testified as to Bridges' proposed attendance at Communist Party meetings. Such testimony, if credited, would properly weigh heavily against Bridges. But this is what the presiding Inspector said about each of these seven witnesses:

1. Diner—"not an impressive witness" and the episode to which he testified "not established" (R. 295-6).

2. Honig—testimony contains "conflicts", and episodes to which he testified "not established" (R. 300).

3. Laurence—"too much chance of mistake in identification" and episode to which he testified "not established" (R. 302-3).

4. Cannalonga—"I cannot tell where the truth lies in any uncorroborated statement of Cannalonga. At times, in my judgment, he clearly falsified * * *" His testimony "is without value" (R. 307-8).

5. St. Clair—"inherently improbable", "deep-seated and violent bias". "His vanity * * * influences him toward the sensational" (R. 310).

6. Wilmot—"indefinite", "somewhat self contradictory" and "not established" (R. 312, 315).

7. Thompson—"not established" (R. 317).

It is with respect to these seven witnesses that the Attorney General, while fully accepting the judgments made

by Judge Sears, nevertheless said "* * * taken as a whole * * * it cannot be completely disregarded" (R. 98).

If one sow's ear cannot be made into a silken purse, several can, if "taken as a whole".

* * * * *

And if there be anything lacking in this mosaic of mischief, we turn attention to the process used by the Attorney General for arriving at his final adverse decision.

The presiding Inspector, Judge Sears, is not a departmental person; he was designated especially for this case to hear evidence and to make recommendations. The Board of Immigration Appeals, on the other hand, is the body created by the Regulations of the Attorney General, expressly vested with the power of the Attorney General. It is vested with power—

> "To issue orders of deportation after proceedings in accordance with law and regulations; to order the cancellation of warrants of arrest issued in such proceedings; and in connection therewith to exercise such of the discretion conferred upon the Attorney General by law as is appropriate to the disposition of deportation proceedings," 8 *Code of Federal Regulations*, Sec. 90.3 (1).

See Appendix, p. 108. This Board possesses "quasi-judicial jurisdiction" with "authority to render final decisions in all cases involving the disposition of deportaton proceedings" (Annual Report of the Attorney General, June 30, 1941, pp. 225, 234). Administrative review of the Board's decisions by the Attorney General is provided for in the following limited cases:

> "In any case in which a dissent [of a Board member] has been recorded; in any case in which the Board shall certify that a question of difficulty is involved; in any case in which the Board orders the suspension

of deportation pursuant to the provisions of Section 19(c) of the Immigration Act of 1917 as amended, or in any case in which the Attorney General so directs • • •." 8 *Code of Federal Regulations*, Sec. 90.12.

In these four categories the Attorney General has the right of review, but "in all other cases the decision of the Board of Immigration Appeals is not subject to administrative review" (Annual Report of the Attorney General, *supra*, p. 235).

The only category of permissible review by the Attorney General applicable in this case was under the heading "in any case in which the Attorney General so directs." No notice of any such direction ever reached Bridges.

Up to the time of adverse decision against Bridges by the Attorney General, the only advice of governmental action which Bridges had received was the wholly favorable public decision of the Board cancelling the warrant of arrest (R. 492). True, execution of the order was stayed "pending further order of the Attorney General or of this Board" (R. 492); but such a stay, by itself, could reasonably have been construed as intended only to provide a period during which the Service, in accordance with its rights under the rules, could request reopening, reconsideration and reargument before the Board (Rules 150.8(a); 90.10), or the Attorney General could consider whether he should, under the rules, direct that the case be referred to him for review. It does not appear anywhere in this record that the Attorney General directed that the case be referred to him for review, or that the Board did so. Yet such referral to the Attorney General, as in fact seems to have occurred, could only have followed upon a direction from the Attorney General that the case be so referred to him. So far as Bridges knows, there never was any such direction by the Attorney General or referral of the case to the Attorney General.

Now Bridges' complaint here goes far beyond the failure to give him advice that the Attorney General directed the Board to pass the case on to him for review. It goes to the very heart of fair procedure:

> Bridges never knew that in his particular case the power of decision had been withdrawn from the Board and had been taken by the Attorney General.
>
> Bridges never knew that the Attorney General was considering reversal of the Board's decision.
>
> Bridges never knew that the Attorney General proposed to reverse the Board's decision.
>
> Bridges never knew that the Attorney General proposed to order his deportation.
>
> Bridges was never given an opportunity to reach the mind of the man who had newly taken to himself the power of decision.

The springs of the *Morgan* cases (298 U. S. 468; 304 U. S. 1) did not water this procedure. "The requirements of fairness are not exhausted in the taking or consideration of evidence but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps." *Morgan* v. *United States*, 304 U. S. 1, 20.

We submit that in application here, this at least is the teaching of the *Morgan* cases,—that when issues are freshly brought to focus before a new deciding officer the specific grounds upon which he proposes to overturn an existing public decision (if such be his disposition) be given the person to be adversely affected and that an opportunity be provided to reach the deciding officer's mind. Otherwise, there is essential unreality in the concept of "fair hearing."

The Rules of the Department itself,—on the level of relationship between the presiding Inspector and the Board of Appeals,—give depth and authority to this view.

Section 90.11 provides as follows:

> "Whenever, in any deportation case in which no exceptions have been taken to the proposed findings, conclusions of law and order of the presiding inspector, the Board of Immigration Appeals after consideration of the record believes that an order less favorable to the alien than that proposed by the presiding inspector should be entered, it shall prepare its own proposed findings of fact, conclusions of law, and order and shall forward them to the district director of the district in which the case arose for service upon the alien or his counsel or representative. The alien or his counsel or representative shall be given opportunity, within a time fixed by the Board of Immigration Appeals, to file exceptions to the proposed findings, conclusions, and order of the Board. If exceptions are filed, further procedure in the case shall be in accordance with the provisions of Sec. 90.5 hereof * * *"

Here is procedure that acknowledges the fundamental condition of fair hearing, namely, that before deciding adversely to decisions theretofore made, fresh opportunity for hearing be given to the person sought to be newly adversely affected.

Advice to Bridges that the Attorney General had directed the case to be referred to him for review, and advice to Bridges as to what the Attorney General proposed to do, and why, with fair opportunity to meet the proposal, would in no way have crippled or embarrassed the exercise of the Attorney General's functions. On the contrary, the Attorney General, by so doing, would have accredited himself "by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play." *Morgan* v. *United States, supra,* p. 22.

Have the standards appropriate to the performance of quasi judicial functions in the sensitive area of deportation been maintained in this case? We submit no fair reading of this record can sustain the answer yes.

Bridges, who has been the object of determined and persistent attention since 1934 upon grounds only of belief and imputed belief, grounds which cut across the roots of the most profound American traditions, was subjected to a trial on those grounds in 1939, notwithstanding that previous exhaustive departmental investigations had disclosed no basis for action. That trial was conducted carefully and thoroughly and resulted in findings wholly in his favor. Nevertheless, the underlying statute was amended specifically to support new proceedings against him. And he was subjected to new proceedings, a trial in which the same issues of fact were encompassed in part upon identical testimony, and for the rest upon identical lines of proof. Not only were considerations of fairness implicit in the double jeopardy and *ex post facto* provisions of the Constitution and in the concept of res judicata, designed to prevent an accused from being worn out with accumulated trials, ignored, but Bridges was singled out for invidious treatment. Finally, a decision adverse to him was arrived at without true opportunity to be heard by the person who did the deciding.

Is this a chronicle that is "characteristic of democratic rule"? Is this a chronicle in conformity with "the amenities that distinguish a free society"? Is this a chronicle that shows avowed attention to the "necessary and salutary checks on the authority of government * * * (that) provide a standard of official conduct which the courts must enforce"? (Murphy, J., *Goldman* v. *United States*, 316 U. S. 129, 142.) We submit it is not. As Mr. Justice

Murphy said in the *Goldman* case:

> "At a time when the nation is called upon to give freely of life and treasure to defend and preserve the institutions of democracy and freedom, we should not permit any of the essentials of freedom to lose fidelity through legal interpretations that are restrictive and inadequate for the period in which we live."

III

THE STATUTE AS CONSTRUED AND APPLIED OFFENDS THE BILL OF RIGHTS AND BEARS NO REASONABLE RELATION TO THE PURPOSE FOR WHICH GOVERNMENTAL POWER TO DEPORT EXISTS.

The First Amendment provides that Congress shall pass no law abridging the freedom of speech or of the press * * * or the right of the people peaceably to assemble.

The Fifth Amendment provides that no person shall be deprived of life, liberty or property without due process of law.

The Government contends that an alien may be deported "for utterances, beliefs or associations in which he would be protected from punishment by the First Amendment," (Government Brief below, p. 20 and Government Memorandum in opposition to petition for certiorari, p. 3[43]). The Government's contention strikes at "the area of allowable thought" of three and a half million aliens lawfully resident in this country. By this contention, the Govern-

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[43] The District Court, sustaining the Government's contention, wrote paradoxically: "If the result is a curtailment of their [aliens'] freedom of speech while in this country, it is a curtailment consonant with the constitutional guarantees of the Bill of Rights" (R. 737). The court below did not see fit to discuss the constitutional issues here considered.

ment tells these three and a half million aliens—the Bill of Rights is for you as well as for citizens, but if you use it, we can deport you. "Of what avail are such guarantees", asked Mr. Justice Brewer fifty years ago. *Fong Yue Ting* v. *United States,* 149 U. S. 698, 743.

We contend simply, that a ground which would not support punishment because offensive to the great guarantees of the Bill of Rights may not validly be a ground for deportation. If we are right in this, we contend further that the statute in question, as construed and applied here, denies guarantees of the First and Fifth Amendments. In any event the statute as construed and applied bears no reasonable relation to the purpose for which governmental power to deport exists.

1

The power of Congress to provide, on any grounds it sees fit, for the expulsion even of aliens with an established domicile here, was asserted in sweeping terms in 1895. *Fong Yue Ting* v. *United States,* 149 U. S. 698. This was a Chinese expulsion case. But even at the moment of decision, three members of the Court—Chief Justice Fuller, Justices Brewer and Field—dissented pr[illegible]ndly. Said the Chief Justice (p. 763):

> "* * * it contains within it the germs of the assertion of an unlimited and arbitrary power, in general, incompatible with the immutable principles of justice, inconsistent with the nature of our government, and in conflict with the written Constitution by which that government was created and those principles secured."

Eight years later, in the *Japanese Immigrant Case,* 189 U. S. 86, 100, this Court rejected the full sweep of *Fung Yue Ting.* Mr. Justice Harlan for the Court, overruling Government contentions strikingly similar to those advanced

here, said:

> "But this court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution."

That the fundamental principles of procedural due process have full rein in deportation has since become settled doctrine, notwithstanding "the plenary power of Congress to exclude or deport aliens" (quoted phrase taken from Government's brief below, p. 21). *Lloyd Sabaudo Societa* v. *Elting*, 287 U. S. 329, 335. Rejection of the Government's argument of "plenary power" in the *Japanese Immigrant Case*, forty odd years ago, has left the Republic unshaken.

But the Fifth Amendment embodies substantive, as well as procedural guarantees,—and these, "to any person". And the First Amendment prohibits "all laws" abridging freedom of speech and of the press or the right of people peaceably to assemble, "not merely some laws or all except" deportation laws or all except laws within the "plenary power of Congress". See Stone, C.J., in *Jones* v. *Opelika*, 316 U. S. 584, 609.

The Bill of Rights is distorted if we see it only as a bill of privileges that are a good for the person who desires to use them. These rights are called "the great, the indispensable democratic freedoms" (*Thomas* v. *Collins*, 65 S. Ct. 315, 322) for a deeper reason. It is because these freedoms are "indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society". *Thornhill* v. *Alabama*, 310 U. S. 88, 103. It is because through their free use in a free society "the remedial channels of the democratic process remain open and unobstructed". *Minersville School District* v. *Gobitis*, 310 U. S. 586, 599. It is because the exer-

cise of these freedoms is "so vital to the maintenance of democratic institutions". *Schneider* v. *State*, 308 U. S. 147, 161. It is because "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of thought to get itself accepted in the competition of the market.". Holmes, J., dissenting, *Abrams* v. *United States*, 250 U. S. 616, 630. "Therein," said Chief Justice Hughes, "lies the security of the Republic, the very foundation of constitutional government." *DeJonge* v. *Oregon*, 299 U. S. 353, 365.

Surely this foundation for the Bill of Rights does not admit of a distinction between citizen and alien.[*] The quality of an idea "to shape the destiny of modern industrial society" or its possibility of contributing to the "ultimate good" does not turn on whether it springs from alien or citizen.

This case bears no different cast from any other case which, though involving a citizen, confronts this Court with the duty of deciding where an asserted freedom ends and the sovereign's power begins. The proffered phrase—"plenary power of Congress" is no solving phrase. If it were, it "would resolve every issue of power in favor of those in authority and would require us to override every belief thought to weaken or delay execution of their policies". *Board of Education* v. *Barnette*, 319 U. S. 624, 636. The Court there said:

> "Government of limited power need not be anemic government. Assurance that rights are secure tends

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[*] On this question the attitude appropriate for judgment must take into account a fact of broadest implication. The treatment accorded to aliens lawfully resident here is naturally regarded, by the countries of which such aliens are nationals, as an expression of policy. No branch of our Government is warranted in ignoring the international repercussions of a policy of discrimination. (See Wasserman, "The Challenge of Our Immigration Laws" III Journal of Legal and Political Sociology, 100, 112-114.)

to diminish fear and jealousy of strong government, and by making us feel safe to live under it makes for its better support. Without promise of a limiting Bill of Rights it is doubtful if our Constitution could have mustered enough strength to enable its ratification. To enforce those rights today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end.

* * * Observance of the limitations of the Constitution will not weaken government in the field appropriate for its exercise."

The challenge of "plenary power", sometimes in another guise,—that of "police power"—has faced this Court in every decision involving issues of freedom. Authority confronts freedom. And freedom has a preferred place in our scheme, it has a "sanctity and a sanction not permitting dubious intrusions." *Thomas* v. *Collins*, 65 S. Ct. 315, 322. "And it is the character of the right [i. e., the freedom asserted], not of the limitation [i. e., the State's power], which determines what standard governs the choice." (*ibid.*).

In *Turner* v. *Williams*, 194 U. S. 279, 292, this Court held the First Amendment is not secured to excluded aliens:

"It is, of course, true that if an alien is not permitted to enter this country, or, having entered contrary to law, is expelled, he is in fact cut off from worshipping or speaking or publishing or petitioning in the country, but that is merely because of his exclusion therefrom. He does not become one of the people to whom these things are secured by our Constitution *by an attempt to enter* forbidden by law. To appeal to the Constitution is to concede that this is a land governed

by that supreme law, and as under it the power to exclude has been determined to exist, those who are excluded cannot assert the rights in general obtaining in a land to which they do not yet belong as citizens or otherwise." (Italics ours.)

The reason for the decision appears plain from the extract. An alien who has not yet lawfully entered "does not become one of the people to whom these things are secured by the Constitution". But if he "belongs" as a citizen "or otherwise",[45] he is one of the people to whom these

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[45] Valuable light in this connection is shed in the dissenting opinion of Justice Brewer in *Fong Yue Ting* v. *United States*, 149 U. S. 698, 736:

"Indeed, there is force in the contention of counsel for appellants, that these persons are 'denizens' within the true meaning and spirit of that word as used in the common law. The old definition was this:

'A denizen of England by letters patent for life, entayl or in fee, whereby he becomes a subject in regard of his person.' *Craw* v. *Ramsay*, Vaughan, 278.

And again:

'A denizen is an alien born, but who has obtained *ex donatione regis* letters patent to make him an English subject. * * * A denizen is in a kind of middle state, between an alien and a natural-born subject and partakes of both of them.' 1 Bl. Com. 374.

In respect to this, after quoting from some of the early constitutions of the states, in which the word 'denizen' is found, counsel say: 'It is claimed that the appellants in this case come completely within the definition quoted above. They are alien born, but they have obtained the same thing as letters patent from this country. They occupy a middle state between an alien and a native. They partake of both of them. They cannot vote, or, as it is stated in Bacon's abridgement, they have no "power of making laws," as a native-born subject can, nor are they here as ordinary aliens. An ordinary alien within this country has come here under no prohibition, and no invitation, but the appellants have come under the direct request and invitation and under the "patent" of the Federal government. They have been guaranteed "the same privileges, immunities, and exemptions in respect to * * * residence" (Burlingame Treaty concluded July 28th, 1868)

(*Continued on following page*)

things are secured by our Constitution. That the "otherwise" includes lawfully resident aliens has not been questioned since *Yick Wo* v. *Hopkins*, 118 U. S. 356. See, *Truax* v. *Raich*, 239 U. S. 33; *Abrams* v. *United States*, 250 U. S. 616; *Hague* v. *C. I. O.*, 307 U. S. 496.

And by a dramatic turn, the very alien at bar, Bridges, has been told by this Court that he is one of the people to whom the Bill of Rights is secured by our Constitution. *Bridges* v. *California*, 314 U. S. 252. Is he now to be told that the Government is competent to deport him for the conduct which this Court held was secured by the Bill of Rights? The answer to this question is the full answer to the Government contention in this case that "the First Amendment is inapplicable".

If banishment from the land overhangs free exercise of the Bill of Rights, what did this Court decide in the *Hague* case, in *Truax* v. *Raich*, in *Yick Wo*, in *Bridges* v. *California*? And did this Court *except* the alien in the *Thornhill* case,[46] in the *Pamphlet* cases,[47] in the *Religious Freedom* cases,[48] in *DeJonge* v. *Oregon*, 299 U. S. 353, in *Herndon's Case*, 301 U. S. 242? No person "with such a threat hanging over his head could be free". *Cf. Schneiderman* v. *United States*, 320 U. S. 118, 167.

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as that enjoyed in the United States by the citizens and subjects of the most favored nation. They have been told that if they would come here they would be treated just the same as we treat an Englishman, an Irishman, or a Frenchman. They have been invited here, and their position is much stronger than that of an alien, in regard to whom there is no guaranty from the government, and who has come not in response to any invitation, but has simply drifted here because there is no prohibition to keep him out. They certainly come within the meaning of 'denizen' as used in the constitutions of the states."

[46] *Thornhill* v. *Alabama*, 310 U. S. 88.

[47] *Schneider* v. *State*, 308 U. S. 147; *Lovell* v. *Griffin*, 303 U. S. 444; *Jones* v. *Opelika*, 316 U. S. 584.

[48] *Murdock* v. *Pennsylvania*, 319 U. S. 105; *Board of Education* v. *Barnette*, 319 U. S. 624; *Douglas* v. *City of Jeanette*, 319 U. S. 157; *Martin* v. *Struthers*, 319 U. S. 141.

Assuming then that the substantive freedoms guaranteed by the Bill of Rights are applicable here, we contend they are violated by Sections 1 and 2 of the Act of October 16, 1918, as amended (*supra*, pp. 3-4), if these sections be construed and applied to authorize the Attorney General's order deporting Bridges. We assert offense to the guarantees of free speech and free assembly and of liberty.

The order of deportation rests upon a finding that Bridges "has been" a member of the Communist Party, an organization found to advocate the overthrow of the Government of the United States by force and violence. There is no evidence or finding that Bridges personally believed in or advocated such doctrine, or understood the Communist Party so to advocate, or ever himself subscribed to such views or himself ever committed or attempted to commit any overt act in the direction of realizing any such views. It is proposed to deport Bridges by imputing to him the supposed forbidden doctrine of the Communist Party, and the imputation rests on the ground only of bare membership.

Consequently, the order of deportation, upon the record here, necessarily gives the statute the construction that, for an alien, mere one time membership in the Communist Party, without his having advocated or subscribed to its supposed forbidden doctrine or understood it to hold such doctrine, is ground for deportation. The question is whether this construction and application of the statute deprives Bridges of the right of freedom of speech and of assembly and of the liberty guaranteed by the First and Fifth Amendments.

The constitutional infirmity we urge here is that the statute as construed and applied strikes not at advocacy of forbidden doctrine, but at innocent, even casual, as-

sembly with those who may so advocate. See Mr. Justice Brandeis, *Whitney* v. *California,* 274 U. S. 357, 373.

There is a profound tradition in American life to which all notion of guilt by imputation is abhorrent. It holds that responsibility is personal, that no man shall suffer penalty for the deed of another. No decision of this Court has heretofore rested a conclusion of guilt upon innocent assembly or association. So-called syndicalism laws, when sustained in this Court, have turned decisively on the relation fixed in the statute between membership and knowledge of the unlawful doctrines advocated by the organization. See *Whitney* v. *California, supra; Burns* v. *United States,* 274 U. S. 328, and *cf. Gitlow* v. *New York,* 268 U. S. 652, and *Schenck* v. *United States,* 249 U. S. 47.

By the deportation law of 1918, however, guilt by association alone was introduced for the first time into a federal law. Neither the Sedition Act of 1798 nor the Espionage Acts of 1917 and 1918 had drawn upon such a conception. As Mr. Chafee has said: "We got safely through the Civil War and the World War without finding it necessary to create group guilt outside the limits of an actual conspiracy" (Free Speech in the United States, 1941, p. 470). Professor Chafee has noted significantly that even the two lawyers charged by the Department of Justice with the enforcement of the Espionage Act during the First World War had publicly condemned statutes penalizing men for mere membership in an organization. Alfred Bettman pronounced such a proposal an "absolutely complete departure from our traditional American doctrines," adding "one of the fundamental conceptions of Anglo Saxon law is that guilt is personal and not by association." John Lord O'Brian said: "Abandonment of the doctrine of personal guilt" in our deportation statute presented an "anomaly in our jurisprudence." *The Menace of Administrative Law,* 25 Re-

ports, Maryland State Bar Assn., 1920, p. 163. Chief Justice Hughes reminded in 1920, when opposing the expulsion of the Socialist Assemblymen in New York: "It is the essence of the institution of liberty that it be recognized that guilt is personal" (quoted by this Court in *Schneiderman* v. *United States*, 320 U. S. 118, 154, note 41).

This Court has also drawn lines relevant to judgment here.

DeJonge v. *Oregon*, 299 U. S. 353, brought to this Court a conviction under the Criminal Syndicalist Law of Oregon. The Act made it a criminal offense to preside at or to assist in the conducting of a meeting of an organization which advocates violence as a means of effecting industrial or political change. A finding that the Communist Party as such did advocate the forbidden doctrine was not disputed on this appeal. DeJonge, a member of the Party, was charged with assisting in the conduct of a meeting called under the auspices of the Communist Party, and, on this charge, convicted. The State contended the gist of the offense was conducting a meeting called by an organization that advocated forbidden doctrine, regardless of what was advocated at the particular meeting so conducted, and that proof of illegal advocacy at such meeting was immaterial.

This Court, in an opinion by Chief Justice Hughes, reversed the conviction. Notwithstanding that it was not disputed on the record that the Communist Party was an organization which advocated forbidden doctrine, this Court held that failure to charge or prove that the Party had advocated forbidden doctrine at the particular meeting was fatal. "His sole offense as charged," said the Court, was "that he had assisted in the conduct of a public meeting, albeit otherwise lawful, which was held under the auspices of the Communist Party" (*ibid.* 362).

"• • • consistently with the Federal Constitution • • • [such conduct] cannot be made a crime" (p. 365).

Thus, advocacy of forbidden doctrine by the Communist Party was held not imputable even to a meeting called by it and held under its auspices. Legality of the meeting was not affected by the illegality of the Party which called it and held it. Lawful assembly was not made unlawful by virtue of its having been called or managed by groups or persons who in other relations or in other utterances had unlawful objectives. In short, guilt by association was rejected.

In *Herndon* v. *Lowry*, 301 U. S. 242, Herndon was convicted under a statute making it a crime to induce others to join in violent overthrow of government. He was a member of the Communist Party, assumed in this case to advocate some unlawful tenets. The conduct at the basis of the criminal charge was his holding of meetings for the purpose of recruiting members in the Party, procuring such members and soliciting contributions for the support of the Party. Although some of the tenets of the Party were assumed to be seditious, and although the persons Herndon had induced to become members of the Party "agreed to abide by the tenets of the Party," the conviction was reversed as a constitutional invasion of the right of free speech. Basic among the reasons for reversal was that there was no proof that Herndon "brought the unlawful aims [of the Party] to their notice" or "that he approved them" (at p. 260).

Thus, again we see rejection of all notion of guilt by association. This Court declined to associate Herndon with the unlawful aims of his Party because it was not shown "he approved them." Nor were Herndon's converts, even though they agreed to abide by the tenets of the Party, associated with any of its unlawful tenets because there was "absence of proof that he [Herndon] brought the unlawful aims to their notice."

In *Whitney* v. *California*, 274 U. S. 357, where a conviction was sustained under a state syndicalist law which forbade "knowingly" being a member of a proscribed organization, Mr. Justice Brandeis, with concurrence of Mr. Justice Holmes in a separate opinion, nevertheless said: "The novelty in the prohibition introduced is that the statute aims, not at the practice of criminal syndicalism, nor even directly at the preaching of it, but at association with those who propose to preach it" (p. 373).

The meeting in *DeJonge's* case was not infected with the supposed illegal character of the Party which called it, absent proof of illegal advocacy at the meeting. Herndon's proselytizing of members into an illegal party was not made crime, "absent proof that he brought the Party's unlawful aims to their attention." Even Miss Whitney's knowing membership in a party preaching criminal syndicalism was said by Mr. Justice Brandeis to be "a right within the protection of the Fourteenth Amendment" (274 U. S. 357, 379). The instruction of this Court then can only mean, in application here, that any relationship between Bridges and the Party may not be transmuted into legal sin, that Bridges in assembling with the Party did not exceed the bounds of free assembly marked by the Constitution,—unless at least it be proven in addition that he had knowledge of the Party's forbidden objectives or doctrines and himself subscribed to them.

Freedom of Speech and assembly are "cognate rights." *Thomas* v. *Collins*, 65 S. Ct. 315, 323. As freedom of speech must not be stifled by threats overhanging its exercise, so freedom of assembly must not be paralyzed by one's fear of being tied to some hidden ultimate aims of others. A "liberty-loving society" sees in assembly the same "command of broadest scope" it sees in speech. Cf. *Bridges* v. *California*, 314 U. S. 252, 263.

There is a second, and by itself decisive, constitutional infirmity in the statutory application here by reason of its necessary dependence on the finding that the Communist Party is a proscribed organization under the statute. If the Court reaches this issue, it will be passing upon it for the first time. See *Schneiderman* v. *United States*, 320 U. S. 118, 147-8, and inferior federal court cases there cited.

The Communist Party as such is not proscribed by the statute. Indeed, bills to write a definition of "Communist" into the Immigration and Deportation Act of 1918, as amended, and to provide for the deportation of "Communists," as such, failed of passage in Congress in 1932 and again in 1935. *Schneiderman* v. *United States*, 320 U. S. 118, 132, footnote 8. A similar recommendation by the Attorney General in 1940, the very time of enactment of the operative statute here, got nowhere (*supra*, pp. 9-10). Even the Nationality Act of 1940 (8 U. S. C. § 705) does not in terms make Communist beliefs or affiliation grounds for refusal of naturalization. In 1936 the Communist Party appeared on the political ballots of thirty-three states, including Arkansas, Delaware, Indiana and Tennessee, where statutes exclude from the ballot parties advocating violent overthrow of government. See 48 Yale Law Jnl., 111, 116, footnote 35, and 37 Columbia Law Review, 86.

We are confronted here, however, with an administrative finding of fact that the Communist Party is an organization that believes in and advocates overthrow by force and violence of the Government of the United States. Now this "finding of fact" is plainly in the category of "most general conclusions of ultimate fact" and its significance for this Court turns only upon the "underlying facts" relied upon by the fact-finder. *Schneider-*

man v. *United States*, 320 U. S. 118, 129-130. Indeed, in this case the finding of fact implies not only the application of standards of law, but the application of the Constitution. The fact-finder is not permitted to drain the Constitution of its meaning "while this Court sits." As Mr. Justice Jackson said in *Thomas* v. *Collins*, 65 S. Ct. 315, 330:

> "If this Court may not or does not in proper cases inquire whether speech or publication is properly condemned by association [with some variety of 'sedition'], its claim to guardianship of free speech and press is but a hollow one."

Thus, again, easy formulas will not do. This is not at all an issue of whether an administrative finding is so lacking in evidentiary support as to amount to a denial of due process. The administrative finding we are talking about here goes to the jugular of the Bill of Rights.

This Court has, in a long series of decisions, developed a crucial "working principle" for cases in which the scope of constitutional protection of freedom of expression is in issue. That principle is that to justify restriction upon speech or press or assembly, nothing less must be shown than that the danger apprehended from the exercise of those rights is imminent.

> "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. Those cases do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or of the press.' It must be taken as a command of the

broadest scope that explicit language, read in the context of a liberty-loving society, will allow." *Bridges* v. *California*, 314 U. S. 252, 263.

And the justification for restriction must be affirmative. For "the freedoms of the First Article" occupy "the preferred position" and legislation impinging upon these freedoms "cannot be sustained by any presumption of validity". *Prince* v. *Massachusetts*, 321 U. S. 158, 167. These "freedoms * * * are to be presumed to be invulnerable and any attempt to sweep [them] away" is "prima facie invalid" (*ibid.* at p. 173).

The questions here are, has the right "working principle" been applied, and is there substantial ground for believing that it was rightly applied? The only answer possible to the first question, on the record here, is enough to discharge Bridges because it is not even professed by anyone in this case that the clear and present danger test has here been applied to the Communist Party, since it now is and always has been the position of the Government that the Bill of Rights is inapplicable to this case.

Do the fact-finders' subsidiary conclusions nevertheless supply the defect? And may it fairly be said that, although unwittingly, the test has, by them, been met? We have already examined the recommended findings of the presiding inspector adopted by the Attorney General (*supra*, pp. 16-18). Those pages bear re-reading here. Judge Sears, and after him the Attorney General, not only found no imminence of substantive evil, but, on the contrary, affirmatively found its remoteness. Any objective of overthrow of government by force and violence was specifically said in the Sears report time and again to be "ultimate".

"I am unable to assent to the suggestion," said Mr. Justice Brandeis, "that assembling with a political party, formed to advocate the desirability of a proletarian revolution by mass action at some date necessarily in the future,

is not a right within the protection of the Fourteenth Amendment". *Whitney* v. *California;* 274 U. S. 357, 379. And see *Shaw* v. *State,* 76 Okla. Crim. 271, 303-8, 315-16. Nor, we believe, will this Court assent to the suggestion.

If we examine the actual evidence relied upon, the result is no different. The opinion of the Attorney General and the recommendations of Judge Sears disclose (1) specific reliance upon the Communist Manifesto of 1848, Lenin's State and Revolution, first published in 1917, the Theses and Statutes of the Third International (R. 172-4), and (2) general reliance upon "abundant" "similar expressions in Communist literature" (R. 174), and (3) general reliance upon oral testimony of witnesses to corroborate "the documentary expressions of the teaching of the Communist Party" (R. 175).

Little is to be gained by detailed analysis of this material. It has already been studied by this Court in the *Schneiderman* case. The Court there said (pp. 157-8):

> "A tenable conclusion from the foregoing is that the Party in 1927 desired to achieve its purpose by peaceful and democratic means, and as a theoretical matter justified the use of force and violence only as a method of preventing an attempted forcible counter-overthrow once the Party had obtained control in a peaceful manner, or as a method of last resort to enforce the majority will if at some indefinite future time because of peculiar circumstances constitutional or peaceful channels were no longer open.
>
> There is a material difference between agitation and exhortation calling for present violent action which creates a clear and present danger of public disorder or other substantive evil, and mere doctrinal justification or prediction of the use of force under hypothetical conditions at some indefinite future time—prediction that is not calculated or intended to be presently acted upon, thus leaving opportunity for general discussion and the calm processes of thought and reason."

While it is true that in the same opinion, this Court also stated that it was not saying that a reasonable man could not possibly have found that the Party in 1927 actively urged the overthrow of the Government by force and violence (at p. 153), there is a basic distinction that must be kept in mind in any attempt to relate the passage to this case. The narrow question for decision in the *Schneiderman* case was whether advocacy of such doctrine was incompatible with the statutory requirement of attachment to the Constitution at the time the privilege of naturalization was being extended, and not, as here, whether such advocacy, *without more,* transcends the guarantees of the Bill of Rights. The Court by this passage did not mean to say that such advocacy, *without more,* if viewed in the frame of "clear and present danger" or, more largely, in the frame of the Bill of Rights, might reasonably be held outside the area of constitutionally protected speech. The same Court's subsequently drawn line against only "agitation and exhortation calling for present violent action which creates a clear and present danger of public disorder or other substantive evil" (at p. 157) and its suggested comparison with *Bridges* v. *California,* 314 U. S. 352, Justice Brandeis' concurring opinion in *Whitney* v. *California,* 274 U. S. 357, 372-80, and *Taylor* v. *Mississippi,* 319 U. S. 583 (at pp. 589-90), is striking proof that the Court's previous indication that a reasonable man could possibly have found forbidden advocacy on the basis of the relevant documents alone was far removed from an indication that a reasonable man could possibly have found, on the same basis that the "clear and present danger" test had been transcended by the Party.

The *Schneiderman* case did hold, however, that such proof as here did not support denaturalization.

Is it to be said that virtually the identical proof does support deportation of a man who has been here twenty-five years? Like denaturalization, deportation is a fate of ut-

most "gravity", it seeks to undo "new relationships and new interests" which flow from prolonged residence in this country, and when, as here, it turns on issues of belief, the proof is no less "treacherous". See *Baumgartner* v. *United States*, 322 U. S. 665, 675.

4

There is a third, and by itself sufficient, constitutional infirmity in the statutory application to the extent that it rests on the finding that Bridges "has been affiliated with" supposedly proscribed organizations (R. 104).

We have already argued that the conduct of Bridges, even as stated in the findings of fact made by the Attorney General, does not legally satisfy any sound definition of the concept of affiliation (*supra*, pp. 53-64). Here we argue, more basically, that to proscribe such conduct as is here found to constitute affiliation is in any event offensive to freedom of speech and assembly and to due process of law.

As Mr. Justice Jackson recently observed, modern legislative attempts at inroads on the democratic freedoms are not "direct and candid" but avail of a flanking technique. They associate "the speaking with some other factor which the state may regulate so as to bring the whole under official control." *Thomas* v. *Collins*, 65 S. Ct. 315, 330. So, here, exercises of speech and association, if otherwise beyond the reach of government, as we contend, may not be brought within its reach by characterizing them as "affiliation." This Court must inquire whether the particular exercises of speech and assembly shown in the record are properly condemned by such characterization.

We have already summarized the substance of the evidence on this issue (*supra*, p. 16). These, in brief, are the items of speech and conduct which are said to add

up to the forbidden relationship of affiliation: Bridges once spoke favorably of the American Youth Congress and the National Students' League (said to be Communist front organizations) in appreciation of their aid to his union in the 1934 strike (R. 1484-5); he once said (denied by Bridges [R. 7576]) that "the only way that a young fellow could get along in the labor movement today was to join the Communist Party" (R. 7377); he had once discussed with some Communists the policy expressed in a telegram to one of his local union officials (R. 1961, 1991) (denied by Bridges [R. 5849]); he did not object to the publication of Communist releases in a trade-union newspaper where the releases were helpful to his union (R. 5870); he steadfastly opposed red baiting in the trade-union movement (R. 97); he enlisted and accepted the cooperation of the MWIU during the 1934 waterfront strike; he accepted the aid of the Communist West Coast paper, the Western Worker; he urged seamen who were members of the International Seamen's Union, which was recalcitrant in supporting the strike, to leave that union and to join the MWIU (R. 3257-8); he opposed the joint resolution repudiating Communist support and he discussed his attitude with Darcy, a Communist (R. 250); he sought to have MWIU delegates on the joint strike committee (R. 6348); incidental to the preparation for and conduct of the 1934 strike he cooperated in the editing of a mimeographed paper distributed on the waterfront, said to be, but denied by Bridges to be, (R. 3234, 6169-72) published under the auspices of the MWIU (*supra*, pp. 57-63).

Bridges asserted that the above items of speech and conduct which he candidly avowed illustrated his considered philosophy: that he is, above all, interested in the fortunes of his union, that he will seek cooperation from any helpful source when its interests are at stake (R. 374-5), because effective trade union management requires no less.

Dean Landis, confronted with proof of essentially the same character, said (R. 635-6):

> "This evidence * * * falls short of the statutory definition of affiliation. Persons engaged in bitter industrial struggles tend to seek help and assistance from every available source. But the intermittent solicitation and acceptance of such help must be shown to have ripened into those bonds of mutual cooperation and alliance that entail continuing reciprocal duties and responsibilities before they can be deemed to come within the statutory requirement of affiliation. * * * To expand that statutory definition to embrace within its terms *ad hoc* cooperation on objectives whose pursuit is clearly allowable under our constitutional system, or friendly associations that have not been shown to have resulted in the employment of illegal means, is warranted neither by reason nor by law."

The speech and the action here pictured must be seen in the context in which they are set,—the important industrial conflict on the West Coast in 1934, its preparation, conduct and consequences. Of these, too, we have already spoken (*supra*, pp. 5-6). Bridges' strike leadership was surely militant, aggressive and effective. But there is no evidence in this record to call for even slight amendment of the judgment, on this issue, of Dean Landis (R. 635):

> "That Bridges' aims are energetically radical may be admitted, but the proof fails to establish that the methods he seeks to employ to realize them are other than those that the framework of democratic and constitutional government permits."

5

There is a related approach by which it is made equally plain that the statutory application here offends the Con-

stitution. As we have said, the order of deportation upon the record here necessarily gives the statute the construction that for an alien mere one-time membership in the Communist Party "for no matter how short a time or how far in the past so long as it was after the date of entry" (Sen. Rep. No. 1721, p. 3 and Conf. Rep. H. R. 2683, p. 9, 76th Cong. 3d Sess.), without his ever having advocated or subscribed to its supposed forbidden doctrine or understood it to hold such doctrine,[49] is ground for deportation.

Presumably, the power of Congress over deportation is exercised so as to eliminate undesirable aliens. But must not this power of Congress, like any other of its admitted powers, be exercised in a manner showing some reasonable and justifiable relation between the statute and the purpose for which the power exists?

The "reasonable relation doctrine" is firmly established in this Court. It has been applied to determining whether (1) a prima facie presumption declared by a statute is justifiable, and (2) whether the conduct proscribed by a statute bears a reasonable relation to the purpose for which the power to legislate exists. *Bailey* v. *Alabama*, 219 U. S. 219, 238, followed in *Taylor* v. *Georgia*, 315 U. S. 25, and *Pollock* v. *Williams*, 322 U. S. 4; *Tot* v. *United States*, 319 U. S. 463—involving presumptions created by statutes; and *Cummings* v. *State of Missouri*, 4 Wall. 277, 319-20; *Pierce* v. *Society of Sisters*, 268 U. S. 510, 534-35; and *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500, 525—involving the application of the rule of reason to substantive statutory provisions.

Surely this elementary restraint applies as well to deportation statutes. Lest any irrelevant fact be selected as the statutory ground for deportation there must be a

[49] Two of the Government witnesses testified that they were members of the Communist Party for several years before unearthing its alleged basic purpose—the use of force and violence (R. 1523-30, 2228-32).

rational relation between the ground for deportation and the legislative judgment of undesirability.

The proper approach to the statute and its application, in light of its construction, is again found in the approach adopted by this Court in *DeJonge* v. *Oregon*, 299 U. S. 353. Chief Justice Hughes said (pp. 362-3):

> "The broad reach of the statute as thus applied [by the Supreme Court of Oregon] is plain. While defendant was a member of the Communist Party, that membership was not necessary to conviction on such a charge. A like fate might have attended any speaker, although not a member, who 'assisted in the conduct' of the meeting. However innocuous the object of the meeting, however lawful the subjects and tenor of the addresses, however reasonable and timely the discussion, all those assisting in the conduct of the meeting would be subject to imprisonment as felons if the meeting were held by the Communist Party. * * * Thus if the Communist Party had called a public meeting in Portland to discuss the tariff, or the foreign policy of the Government, or taxation, or relief, or candidacies for the offices of President, members of Congress, Governor, or state legislators, every speaker who assisted in the conduct of the meeting would be equally guilty with the defendant in this case, upon the charge as here defined and sustained. The list of illustrations might be indefinitely extended to every variety of meetings under the auspices of the Communist Party although held for the discussion of political issues or to adopt protests and pass resolutions of an entirely innocent and proper character."

Under the statutory application here if an alien became a member of the Communist Party without knowing of its alleged aims, never learned of them, and ceased to be a member many years ago, he would be deported. Again,

if an alien joined the Party ignorant of its alleged purposes but resigned upon learning of them, he also would be deported, although in the eyes of many he would have demonstrated by his conduct his adherence to our constitutional system. In fact, every alien against whom some testimony may be adduced that he was once a "fellow traveler" can be exiled. The statute does not require even membership, and "affiliation," as we have seen, may be a broad term.

See also Chafee, Free Speech in the United States (1941), page 445.

The District Court below concluded that while probably aliens were protected against arbitrary statutes,[50] the statute, as construed, was not unreasonable (49 F. Supp. at 300-301; R. 735-7). The Court supported this conclusion by three grounds: *First*, the Court said that even if the aliens, one time members, have discontinued their affiliation, "they, nevertheless, have manifested a spirit of disloyalty; they have shown a willingness to accept the hospitality and protection offered them by this country, while participating in activities designed * * * toward the eventual revolutionary and violent overthrow of the government whose protection they have enjoyed". But can one fairly charge an individual with "disloyalty" and abuse of "hospitality" in one breath and in another assert that it is immaterial if the alien knew or did not know of the doctrines for which he is condemned? *Second*,

[50] The District Court thought that *Tiaco* v. *Forbes*, 228 U. S. 549, may hold that the legislative branch of the Government may deport individuals by name, or proceed for any arbitrary reason. The Governor General of the Philippines, in the early history of the islands, had ordered the deportation of twelve men of the Chinese colony on the ground that they were dangerous, and his action was specifically ratified by the legislature. They then brought an action for damages against the Governor General. The point was not raised, as the brief shows, that the Governor General and the Philippine Legislature had proceeded against the individuals under a specific and not general act.

the Court found support in decisions sustaining laws which make certain actions criminal without knowledge. No sound analogy can be drawn to such criminal statutes. The ends they serve are different. One of the recognized purposes of criminal laws is to deter the commission of crimes by others, and the effectiveness of the deterrence does not depend upon the knowledge of the man convicted. The purpose of deportation statutes, however, is to eliminate dangerous individuals, and even if deterrence could be regarded also as a purpose, it would hardly be served by a retroactive law. And *third*, the Court urged that proof of knowledge is difficult. It is no more difficult than in scores of other situations in which the law requires it, and the same argument was made and rejected by this Court in *Tot* v. *United States*, 319 U. S. 463, 469, where the attempt was made to sustain a *prima facie* presumption which had been written into the statute. A plea of difficulty does not excuse failure to prove an essential element. See Mr. Justice Murphy *Baumgartner* v. *United States*, 322 U. S. 665, 679-80.

Of the cases above cited, to which this Court has applied the rule of reasonable relation, *Cummings* v. *Missouri*, 4 Wall. 277, is of particular value. After the Civil War, the border state of Missouri sought to punish individuals who had been affiliated with the Confederate cause, and it did so by providing that no one might serve as an attorney, an officer of a corporation, a teacher, or a priest or minister, without first taking oath that he had never aided in the rebellion against the United States. A priest was convicted for performing his duties without first taking the oath, and he challenged the constitutionality of the law. This Court held the bill bad, both because it was an *ex post facto* law and because there was no reasonable relation between the oath required and the purpose for which the legislature alone had any right to legislate. Mr. Justice Field declared (p. 320):

"It is manifest upon the simple statement of many of the acts and of the professions and pursuits; that there is no such relation between them as to render a denial of the commission of the acts at all appropriate as a condition of allowing the exercise of the professions and pursuits. The oath could not, therefore, have been required as a means of ascertaining whether parties were qualified or not for their respective callings or the trusts with which they were charged. It was required in order to reach the person, not the calling. It was exacted, not from any notion that the several acts designated indicated unfitness for the callings, but because it was thought that the several acts deserved punishment, and that for many of them there was no way to inflict punishment except by depriving the parties, who had committed them, of some of the rights and privileges of the citizen."

6

The conclusion on this head of our Brief is that the alien Bridges may not be deported for thought, speech or conduct secured by the Bill of Rights, that the grounds for deporting Bridges comprise thought, speech and conduct secured by the Bill of Rights and bear no reasonable relation to the purpose for which governmental power to deport exists.

Conclusion

The order denying Bridges' petition for habeas corpus should be reversed, his release granted, and the warrant for his deportation cancelled.

Respectfully submitted,

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Appendix A—The Statute

Act approved October 16, 1918 as amended.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any alien who, at any time, shall be or shall have been a member of any one of the following classes shall be excluded from admission into the United States:

(a) Aliens who are anarchists;

(b) Aliens who advise, advocate, or teach, or who are members of or affiliated with any organization, association, society, or group, that advises, advocates, or teaches, opposition to all organized government;

(c) Aliens who believe in, advise, advocate, or teach, or who are members of or affiliated with any organization, association, society, or group, that believes in, advises, advocates, or teaches: (1) the overthrow by force or violence of the Government of the United States or of all forms of law, or (2) the duty, necessity or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals, or of officers generally) of the Government of the United States or of any other organized government, because of his or their official character, or (3) the unlawful damage, injury or destruction of property, or (4) sabotage;

(d) Aliens who write, publish, or cause to be written or published, or who knowingly circulate, distribute, print, or display, or knowingly cause to be circulated, distributed, printed, published, or displayed, or who knowingly have in their possession for the purpose of circulation, distribution, publication, or display, any written or printed matter, advising, advocating, or teaching, opposition to all organized government, or advising, advocating or teaching: (1) the overthrow by force or violence of the Government of the United States or of all forms of law, or (2)

the duty, necessity or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized government, or (3) the unlawful damage, injury or destruction of property, or (4) sabotage;

(e) Aliens who are members of or affiliated with any organization, association, society, or group, that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue, or display, any written or printed matter of the character described in subdivision (d).

For the purpose of this section: (1) the giving, loaning or promising of money or anything of value to be used for the advising, advocacy, or teaching of any doctrine above enumerated shall constitute the advising, advocacy, or teaching of such doctrine; and (2) the giving, loaning or promising of money or anything of value to any organization, association, society, or group, of the character above described shall constitute affiliation therewith; but nothing in this paragraph shall be taken as an exclusive definition of advising, advocacy, teaching, or affiliation (40 Stat. 1012; 41 Stat. 1008-9; 54 Stat. 673; 8 U. S. C. 137).

SEC. 2. Any alien who was at the time of entering the United States, or has been at any time thereafter, a member of any one of the classes of aliens enumerated in section 1 of this Act, shall, upon the warrant of the Attorney General, be taken into custody and deported in the manner provided in the Immigration Act of February 5, 1917. The provisions of this section shall be applicable to the classes of aliens mentioned in this Act, irrespective of the time of their entry into the United States. (40 Stat. 1012; 54 Stat. 673; 8 U. S. C. 137.)

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Appendix B—The Regulations

Code of Federal Regulations of the United States of America

Part 90—Departmental Organization and Authority

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§90.1 Commissioner of Immigration and Naturalization and other selected officials; powers.—Under the general direction of the Attorney General, the Commissioner of Immigration and Naturalization (hereinafter called the Commissoner) shall supervise and direct the administration of the Immigration and Naturalization Service and, subject to the limitations of other provisions of this Part, shall have authority to exercise all powers of the Attorney General relating to the administration of that Service and the administration of the immigration, nationality, and all other laws administered by that Service and shall designate such officers of the Service as he may select, with the approval of the Attorney General, to exercise any power or authority of the Attorney General in the administration of any designated specific provision of such laws. In any instance in which any officer so selected shall be in doubt as to the construction of applicable law or as to the proper principle covering the exercise of discretion, he shall refer the matter to the Commissioner, who shall, after receiving the advice of the General Counsel, either advise as to the appropriate decision, make decision in his own name, or refer the matter to the Attorney General for decision.*

* §§ 90.1 to 90.50, inclusive, issued under the authority contained in sec. 28, 34 Stat. 606, 45 Stat. 1515, 8 U. S. C. 356, sec. 23, 39 Stat. 892, 8 U. S. C. 102; sec. 24, 43 Stat. 166, 8 U. S. C. 222; sec. 1, Reorg. Plan No. V, 5 F. R. 2132, 2223; sec. 37(a), Pub. No. 670, 76th Cong., 3d sess.; sec. 161, 360 R. S., 5 U. S. C. 22, 311.

90.2 Board of Immigration Appeals. The Board of Review of the Immigration and Naturalization Service is transferred to the Office of the Attorney General. The Board shall hereafter be known as the Board of Immigration Appeals. In the exercise of the powers conferred upon it the Board of Immigration Appeals shall be responsible solely to the Attorney General. There shall be attached to the Board of Immigration Appeals in the Office of the Attorney General a Chief Examiner and such number of examiners as the Attorney General, upon the recommendation of the Board, shall from time to time direct. In the absence of a member of the Board, the Chief Examiner shall have authority to act as member. The Board shall have authority to promulgate, with the approval of the Attorney General, rules of practice governing the proceedings before it, including rules as to the admission and conduct of attorneys practicing before it. The Board shall have authority, with the approval of the Attorney General, to disbar any attorney or other person from appearing in a representative capacity before the Board or before any officers of the Immigration and Naturalization Service.*

90.3 Board of Immigration Appeals; powers. (a) Subject to the provisions of § 90.12 of this Part, the Board of Immigration Appeals in behalf of the Attorney General shall have authority:

(1) To issue orders of deportation after proceedings in accordance with law and regulations; to order the cancellation of warrants of arrest issued in such proceedings; and in connection therewith to exercise such of the discretion conferred upon the Attorney General by law as is appropriate to the disposition of deportation proceedings.

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* For statutory citation, see note to § 90.1.

(2) To consider and determine appeals from decisions of boards of special inquiry in exclusion or preexamination cases, and to exercise such of the discretion conferred upon the Attorney General by law as is appropriate to the disposition of such appeals.

(3) To consider and determine all cases of fines and penalties against steamship companies or other carriers for violations of the immigration laws, to recommend to the Assistant Attorney General in charge of the Criminal Division the prosecution of violators of section 10 of the Immigration Act of 1917, and to exercise such of the discretion conferred upon the Attorney General by law as is appropriate to the disposition of such cases.

(4) To consider and determine all advance applications for the admission of aliens under the Seventh and Ninth Provisos to section 3 of the Immigration Act of 1917.

(b) In any of the cases enumerated in this section in which no exception has been filed to the proposed action of the Service a single member of the Board of Immigration Appeals shall have authority, subject to the provisions of § 90.12 of this Part, to act for the Board in reviewing and signing the Board's decision. In all other cases decisions shall be by a majority of the Board; and the decision of the Board shall be evidenced by the signature of its chairman. Whenever any member of the Board shall disagree with the majority, he shall record his dissent, together with his reasons therefor.*

* * * * * * *

90.5 Board of Immigration Appeals; oral argument in deportation cases. Oral argument shall be heard, upon request, by the Board of Immigration Appeals in any deportation case in which exceptions have been taken by or in

* For statutory citation, see note to § 90.1.

behalf of the alien to the proposed findings of fact, conclusions of law and order of the presiding inspector. At the time of filing such exceptions, an alien or his counsel or representative shall state whether or not an opportunity for oral argument is desired and shall specify a date for such argument. The time for oral argument shall be fixed not less than 3 days nor more than 18 days after the date on which the exceptions are filed, except in cases where the alien is detained at the expense of the Government in which cases oral argument shall be set not more than 5 days from the date of the filing of exceptions. The Board of Immigration Appeals may in its discretion, upon good cause shown in an application by the alien or his counsel or representative, grant permission to file exceptions and requests for oral argument after the time fixed by the officer in charge for such filing has expired. The Board shall have authority, upon its own motion or upon request, to fix or to change the date upon which oral argument is to be heard.*

* * * * * * * *

90.11 Board of Immigration Appeals; service of proposed findings, conclusions of law and order. Whenever, in any deportation case in which no exceptions have been taken to the proposed findings, conclusions of law and order of the presiding inspector, the Board of Immigration Appeals after consideration of the record believes that an order less favorable to the alien than that proposed by the presiding inspector should be entered, it shall prepare its own proposed findings of fact, conclusions of law, and order and shall forward them to the district director of the district in which the case arose for service upon the alien or his counsel or representative. The alien

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* For statutory citation, see note to § 90.1.

or his counsel or representative shall be given opportunity, within a time fixed by the Board of Immigration Appeals, to file exceptions to the proposed findings, conclusions, and order of the Board. If exceptions are filed, further procedure in the case shall be in accordance with the provisions of § 90.5 hereof. If no exceptions are filed within the time prescribed, the proposed findings, conclusions, and order of the Board of Immigration Appeals shall, subject to the provisions of § 90.12 hereof, be made final.*

90.12 Board of Immigration Appeals; reference of cases to the Attorney General. In any case in which a dissent has been recorded; in any case in which the Board shall certify that a question of difficulty is involved; in any case in which the Board orders the suspension of deportation pursuant to the provisions of section 19 (c) of the Immigration Act of 1917, as amended, or in any case in which the Attorney General so directs, the Board of Immigration Appeals shall refer the case to the Attorney General for review of the Board's decision. In any case in which the Attorney General shall reverse the decision of the Board, or in any case in which suspension of deportation is ordered pursuant to the provisions of section 19 (c) of the Immigration Act of 1917, as amended, the Attorney General will state in writing his conclusions and the reasons for his decision.*

* For statutory citation, see note to § 90.1.

Part 150—Arrest and Deportation

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§ 150.1 **(a) Investigation of aliens reported, or believed, to be subject to deportation.** The case of every alien reported, or believed, to be subject to arrest and deportation, shall be thoroughly investigated by such officer as may be designated for that purpose.

(b) Investigations; purpose. The purpose of the investigation shall be to discover whether or not a prima facie case for deportation exists; that is, whether there is credible evidence reasonably establishing (1) that the person investigated is an alien, and (2) that he is subject to deportation.

(c) Investigations; interrogation of aliens under investigation. All statements secured from the alien or any other person during the investigation, which are to be used as evidence, shall be taken down in writing; and the investigating officer shall ask the person interrogated to sign the statement. Whenever such a recorded statement is to be obtained from any person, the investigating officer shall identify himself to such person and the interrogation of that person shall be under oath or affirmation. Whenever a recorded statement is to be obtained from a person under investigation, he shall be warned that any statement made by him may be used as evidence in any subsequent proceeding.

(d) Investigations; refusal to make recorded statement under oath or affirmation. Whenever, in the course of an investigation, admissions or statements are obtained from an alien or statements are made by any other person which indicate that the alien may be subject to arrest and deportation, but the alien or other person refuses to make

a recorded statement under oath or affirmation or refuses or is unable to sign the recorded statement, by name or by mark, the investigating officer shall make a report in writing to the officer in charge, setting forth the facts admitted or stated as to the alien's status under the immigration laws. This report may be used in support of an application for a warrant of arrest, when the investigating officer certifies that no other evidence to establish the facts stated in the report can be readily obtained. Statements obtained in confidence may be included in such report, without disclosure of their source, only if the officer in charge certifies that in his belief such statements are trustworthy.

(e) Investigations; anonymous information. Information received from a person whose name or address is not disclosed to the investigating officer or is known or appears to be fictitious shall not be used to support an application for a warrant of arrest. Such information shall be used only as a guide to obtaining competent evidence to support the facts alleged.

(f) Investigations; extent of interrogation. Where an alien under investigation, after reasonable questioning, makes no admissions which bring him within a deportable class, interrogation shall cease, and the investigating officer, if he still believes that the alien is subject to deportation, shall attempt to secure from other sources the necessary evidence.*

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150.6 (a) Hearing; when to be accorded under warrant. After the alien has been taken into custody under a war-

*§§ 150.1 to 150.14, inclusive, issued under the authority contained in sec. 23, 39 Stat. 892, 8 U. S. C. 102; sec. 24, 43 Stat. 166, 8 U. S. C. 222; sec. 1, Reorg. Plan No. V, 5 F. R. 2223; sec. 37 (a), 54 Stat. 675, 8 U. S. C. 458; 8 CFR 90.1. Statutes interpreted or applied and statutes giving special authority are listed in parentheses at the end of specific sections.

rant of arrest and has been given a reasonable time to arrange for his defense, including, if desired, representation by counsel, and after the formal warrant of arrest has been received, if arrest was accomplished under a telegraphic warrant, the alien shall be granted a hearing to determine whether he is subject to deportation on the charges stated in the warrant of arrest. A hearing under a telegraphic warrant of arrest, and prior to the receipt of the formal warrant of arrest, shall be held only on the request of the alien or his counsel, or when, in the discretion of the officer in charge, it is deemed impracticable to await the receipt of the formal warrant. The alien shall be informed of his right to request a hearing upon a telegraphic warrant prior to the receipt of the formal warrant.

(b) Hearing; presiding inspector to be other than investigating officer. The immigrant inspector assigned to conduct a hearing under a warrant of arrest shall be referred to as the "presiding inspector." The immigrant inspector who conducted the investigation in the case shall not act as presiding inspector unless the alien consents thereto. The presiding inspector shall rule upon all objections to the introduction of evidence or motions made during the course of the hearing. In cases to which no examining inspector has been assigned pursuant to the provisions of paragraph (n) of this section, the presiding inspector shall conduct the interrogation of the alien and the witnesses in behalf of the Government and shall cross-examine the alien's witnesses and present such evidence as is necessary to support the charges in the warrant of arrest. The presiding inspector shall see that all documentary or written evidence is properly identified and introduced into the record as exhibits by number, unless read into the record. He shall further make sure that, subject to the provisions of paragraphs (d), (e), and (g) of this section, the record is a verbatim report of everything that is stated

during the course of the hearing, including the oaths administered, the warnings given to the alien or the witnesses, and the rulings on objections, except statements made off the record with the consent of the alien or his counsel.

(c) Hearing; procedure; notice of charges. At the beginning of a hearing under a warrant of arrest, the presiding inspector shall (1) permit the alien to inspect the warrant of arrest and inform him of the charges contained therein by repeating them verbatim and explaining them in language which will clearly convey to the alien the nature of the charges he must answer; (2) apprise the alien, if not represented by counsel, that he may be so represented if he desires and require him to state then and there for the record whether he desires counsel; (3) place the alien under oath or affirmation; (4) advise the alien of the penalty for perjury; and (5) enter of record as an exhibit, identified by number, the formal warrant of arrest, or a decoded copy of the telegraphic warrant if hearing is held thereunder. The presiding inspector shall further advise the alien of the provisions of paragraph (g) of this section concerning applications for the privilege of departure in lieu of deportation or for suspension of deportation under the provisions of section 19 (c) of the Immigration Act of 1917, as amended, in all cases except those in which the alien is charged with being subject to deportation upon one of the grounds mentioned in section 19 (d) of the said Act. A continuance of the hearing for the purpose of obtaining counsel shall not be granted more than once, unless sufficient cause for the granting of more time is shown.

(d) Hearing; representation by counsel. If counsel be selected, he shall be permitted to be present during the hearing, to offer evidence to meet any evidence presented or adduced by the Government, and to cross-examine wit-

nesses called by the Government. Counsel shall be permitted to state his objections succinctly, and they shall be entered on the record. Argument of counsel in support of his objections shall be excluded from the record. Counsel, however, may submit such argument in the form of a brief to accompany the record.

(e) Hearing; where representation by counsel waived. If representation by counsel be waived the alien shall be permitted to offer evidence to meet any evidence presented or adduced by the Government, to cross-examine witnesses called by the Government, and to make objections, which shall be entered on the record, but his arguments in support of the objections may, in the discretion of the presiding inspector be excluded from the record, in which event, however, the alien shall be permitted to submit such arguments in writing to accompany the record.

(f) Hearing; interpreters. Where the services of an interpreter are found necessary in the conduct of a hearing, the interpreter, if not an employee of the Service, shall be sworn to interpret and translate accurately.

(g) Hearing; application for departure in lieu of deportation or for suspension of deportation. At any time during the hearing the alien may give notice that he wishes to apply for the privilege of departing from the United States to any country of his choice at his own expense in lieu of deportation or for suspension of deportation under the provisions of section 19 (c) of the Immigration Act of 1917, as amended. Such application may be made in the alternative for either type of relief, and a request for the privilege of preexamination may be made in conjunction with a request for the privilege of departure in lieu of deportation. The alien's application shall be made in writing under oath or affirmation on Form I-255 accompanied by General Information Form I-55, duly verified, which

shall be filed in duplicate with the presiding inspector. The original copy of such application and General Information Form, when received, shall be attached to and made a part of the record. The alien shall be warned that any statements made by him in such application or General Information Form may be used as evidence in any proceeding to determine his right to enter, reenter, pass through or reside in the United States and that false answers to any of the questions in such application or General Information Form may bar him from the relief which he requests. The presiding inspector may in his discretion assist the alien in filling out the General Information Form by explaining the questions to him, or he may ask the alien each question directly and record his answer upon the form, or he may require the alien to fill out the form and submit it to him within a reasonable period of time after the conclusion of the hearing. Explanations during the hearing or the reading of questions from the General Information Form need not be made a part of the record of the hearing.

(h) Hearing; order in which evidence shall be presented. The presiding inspector or examining inspector when interrogating the alien at the hearing, shall develop in order (1) the facts concerning his alienage and (2) the evidence relating to the charges in the warrant of arrest or to any additional charges applicable. If the alien has applied or given notice of intention to apply for the privilege of departure in lieu of deportation or for suspension of deportation as provided in §§ 150.6 (g), 150.8 (b), or 150.10 of this Part, the presiding inspector shall inquire thoroughly into all questions relating to the alien's eligibility to the relief requested insofar as such inquiry is necessary to supplement the General Information Form.

(i) Hearing; use of statements or admissions made during investigation. A recorded statement made by the alien

(other than a General Information Form) or by any other person during an investigation may be received in evidence only if the maker of such statement is unavailable or refuses to testify at the warrant hearing or gives testimony contradicting the statements made during the investigation. An affidavit of an inspector as to the statements made by the alien or any other person during an investigation may be received in evidence, otherwise than in support of the testimony of the inspector, only if the maker of such statement is unavailable or refuses to testify at the warrant hearing or gives testimony contradicting the statement and the inspector is unavailable to testify in person.

(j) Hearing; record to contain personal history. All records of hearings shall fully set forth, either in the General Information Form if filed or otherwise, the name or names of the alien (correctly spelled); place of the alien's birth; the name of the nearest town of importance to such place of birth; the province and country in which such place is located; the alien's religion; the names and locations of churches or schools he has attended; the last address of the alien in his native country, in the country of which he is a citizen, or subject, and in the country in which he has last resided; the country in which he embarked for the United States or for foreign contiguous territory; correct names and addresses and the citizenship or nationality of the alien's nearest relatives residing in the country of his birth, and correct names and addresses of all near relatives residing in the United States.

(k) Hearing; physical or mental disability cases; record to contain medical certificate. The record of the hearing accorded an alien who is suffering from any mental or serious physical disability shall be supplemented by a medical certificate showing (a) whether such alien is in condition to be deported without danger to life or health,

and (b) whether he will require special care and attention in case of deportation overseas.

(l) Hearing; additional charges. If, during the hearing, it shall appear to the presiding inspector that there exists a reason additional to those stated in the warrant of arrest why the alien is subject to deportation, he shall notify the alien that such additional charge is lodged against him, and shall proceed with the hearing upon such charge in like manner as on charges contained in a warrant of arrest.

(m) Hearing; alien to be warned of disabilities respecting reentry to the United States. Before the hearing is concluded, the alien shall be warned by the presiding inspector that the Act of March 4, 1929, as amended, provides that any alien who, after arrest and deportation or departure from the United States in pursuance of an order of deportation, enters or attempts to enter the United States, shall be guilty of a felony, and upon conviction shall be liable to imprisonment for not more than two years or a fine of not more than $1,000, or both such fine and imprisonment, unless such entry or attempted entry is made after one year from the date of such departure or deportation, and the alien, prior to his reembarkation at a place outside of the United States or prior to his application in foreign contiguous territory for admission to the United States, has been granted by the Attorney General permission to reapply for admission to the United States.

(n) Hearing; assignment of examining inspector in addition to presiding inspector; duties of inspectors. The officer in charge of the district in which the hearing is to be held may, in his discretion, assign a second immigrant inspector to act at the hearing as the "examining in-

spector". The examining inspector shall conduct the actual interrogation of the alien and of the witnesses in behalf of the Government and the examination or cross-examination of the alien's witnesses, present such evidence as is necessary to support the charges in the warrant of arrest, lodge such additional charges as he may find applicable in the manner hereinbefore directed, and, if the alien has applied for the privilege of departure in lieu of deportation or for suspension of deportation as provided in §§ 150.6 (g), 150.8 (b), or 150.10 of this Part, inquire thoroughly into the alien's eligibility for such relief.* The presiding inspector in such cases, shall exercise all functions not herein assigned to the examining inspector, and he may, in addition, take such part in the interrogation of the alien and witnesses as he may deem necessary to assure that a proper hearing is accorded to the alien.* (Sec. 19, 39 Stat. 889, 54 Stat. 671; 8 U. S. C. 155; Sec. 1, 45 Stat. 1551, 46 Stat. 41, 47 Stat. 166; 8 U. S. C. 180, 181.)

150.7 (a) Proposed findings, conclusions and order; preparation by presiding inspector. As soon as practicable after the hearing has been concluded, the presiding inspector shall prepare a memorandum setting forth a summary of the evidence adduced at the hearing, his proposed findings of fact and conclusions of law, and a proposed order.

(b) Proposed findings, conclusions and order; eligibility for departure in lieu of deportation or for suspension of deportation. If the alien has applied for the privilege of departure in lieu of deportation or for suspension of deportation as provided in §§ 150.6 (g), 150.8 (b) or 150.10 of this Part, the presiding inspector shall follow his con-

* For statutory citation, see note to § 150.1.

clusions of law as to the alien's deportability with a discussion of the evidence relating to the alien's eligibility for such relief and of his reasons for his proposed order. He shall then state in numbered paragraphs his proposed findings of fact and his proposed conclusions of law as to the alien's eligibility for the relief requested.

(c) Proposed findings, conclusions and order; proposed order. In the proposed order the presiding inspector shall recommend cancellation of the proceedings, deportation, departure under order of deportation, departure in lieu of deportation, or suspension of deportation in accordance with the judgment he has made on the basis of the evidence adduced at the hearing.

(d) Proposed findings, conclusions and order; service of findings of presiding officer. A copy of the presiding inspector's memorandum containing his discussion of the evidence, proposed findings of fact, proposed conclusions of law and proposed order shall be furnished to the alien or his counsel in all instances by personal service, if practicable, otherwise by registered mail, and a return receipt therefor shall be obtained. A copy also shall be furnished to the examining inspector, if an examining inspector has been assigned to the case.

(e) Proposed findings, conclusions and order; filing of exceptions. The alien or his counsel or representatives shall be allowed by the officer in charge a reasonable time (not to exceed 10 days except on showing of good cause that more time is necessary) in which to file exceptions to the proposed findings, conclusions, and order of the presiding inspector and to submit a brief, if desired. Reasonable extensions of time for the filing of exceptions or brief may be granted in the discretion of the officer in charge. The examining inspector shall promptly file exceptions to

the proposed findings, conclusions and order of the presiding inspector, or state in writing that he waives the filing of exceptions.*

For the duration of the War which the United States declared existed against Japan on December 8, 1941, and against Germany and Italy on December 11, 1941, alien seamen who entered the United States on or after September 1, 1939, or who shall hereafter enter the United States and against whom deportation proceedings have been or may be instituted shall be allowed a period of 3 days in which to file exceptions or waive the filing of exceptions to the proposed findings, conclusions, and order of the Presiding Inspector and to submit a brief, if desired, in lieu of the time specified in § 150.7 (e) of this title. If oral argument before the Board of Immigration Appeals is requested in behalf of such alien seamen, the time for such argument shall be fixed not more than 3 days from the day notice was given to the alien of the proposed findings, conclusions, and order of the Presiding Inspector in lieu of the time specified in § 90.5 of this title.

150.8 (a) Reopening the hearing. At any time prior to the forwarding of the record of hearing to the Central Office, the officer in charge of the district may direct that a case be reopened for proper cause; and at any time prior to submission of the record to the Board of Immigration Appeals, the Central Office may direct a reopening thereof for proper cause. After the record has been submitted to the Board of Immigration Appeals, the case may only be reopened upon direction of the Board of Immigration Appeals. Requests by aliens, or their representatives, for a reopening of a hearing must be in writing and set forth the grounds for the application. If a request for a reopen-

* For statutory citation, see note to § 150.1.

ing made prior to the submission of the record to the Board of Immigration Appeals is denied by the Central Office or the officer in charge of the district of origin, a report setting forth the reasons for the denial shall be furnished the Board of Immigration Appeals with the record.

(b) Reopening the hearing; applications for departure in lieu of deportation or for suspension of deportation. After the close of a hearing and prior to the submission of the record to the Board of Immigration Appeals, an application by the alien for the privilege of departure in lieu of deportation or for suspension of deportation under the provisions of Section 19 (c) of the Immigration Act of 1917, as amended, may only be made in conjunction with a request, pursuant to paragraph (a) of this section, that the hearing be reopened. After the submission of the record to the Board of Immigration Appeals, such an application may only be made in conjunction with a motion to reopen the hearing, made pursuant to section 90.9 of this title.* (Sec. 19, 39 Stat. 889, 54 Stat. 671; 8 U. S. C. 155.)

*For statutory citation, see note to § 150.1.